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87-865

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

GREGORY LUMBER CO., *Petitioner,*

VS.

THE UNITED STATES, *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER THE UNITED STATES CAN BY CONTRACT DISCLAIM ITS "ESTIMATES" OF QUANTITY, WHERE THE "ESTIMATES" OF QUANTITY WERE USED TO CALCULATE A REQUIRED MINIMUM BID PRICE IN AUCTIONS WITH RESERVE.

II. WHETHER THE TERMS "MORE OR LESS" AND "APPROXIMATELY" AS INTERPRETED BY THIS COURT PERMIT SHORTAGES IN QUANTITY AS HIGH AS 50% IN U.S. CONTRACTS.

III. WHETHER THE UNIFORM COMMERCIAL CODE SHOULD BE APPLIED AS A UNIFIED BODY OF LAW TO A CONTRACT DRAFTED BY THE UNITED STATES GOVERNMENT.

LIST OF PARTIES TO THE PROCEEDING IN THE COURT BELOW

The caption of the case in this Court contains the names of all parties to the appeal to the United States Court of Appeals for the Federal Circuit.

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GREGORY LUMBER CO., ***Petitioner,***

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ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
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PETITION FOR WRIT OF CERTIORARI

Gregory Lumber Company, the Petitioner herein, prays the Court that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Federal Circuit as of this time has not been reported. The Court of Appeals affirmed *per curiam* the decision of the United States Claims Court, Gibson, J., reported at *Gregory Lumber Company v. United States*, 11 Cl.Ct. 489 (1986). No request for rehearing was made.

STATEMENT OF JURISDICTION

No petition for rehearing was requested. This Court has jurisdiction to review the judgment by writ of certiorari under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Uniform Commercial Code (1977)
43 C.F.R. § 5400 (1979)

STATEMENT OF THE CASE

Gregory Lumber Co. ("Gregory") was awarded 12 contracts for timber at auctions by the U.S. Department of Interior through the Bureau of Land Management ("BLM") in Eugene, Oregon. These small business "set aside" sales were conducted pursuant to 43 C.F.R. § 5400 (1979) using BLM formats, procedures, contract forms, and supporting documentation. BLM's files, calculations, and estimates of the amount of standing timber available frequently totalled hundreds of pages for each contract.

The contracts executed between 1975 and 1977 involved timber estimated (*i.e.* "cruised") by BLM through visual measurements to be 53,366,900 board feet. Gregory paid BLM $8,380,875.09 for the 12 contracts based on BLM's estimates. When the felled timber was measured on the ground (*i.e.* "scaled") by an impartial third party, the actual recovery was 39,484,810 board feet with a shortage of 13,882,090 board feet. The aggregate volume recovered was 26% less than that estimated by BLM, in effect, resulting in an overpayment to BLM by Gregory of $2,246,553.52. The shortages in recovery on individual contracts ranged as high as 50% of the estimates published by BLM.

BLM sells billions of board feet of timber valued at billions of dollars in this fashion each year to the public in Oregon. The BLM forms used the terms "approximately" and "more or less" repeatedly in referring to the timber to be sold. The BLM contract form also included disclaimers of quantity, quality and merchantability. The contract form, App. at 070-73,[1] also required the bidder to

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1/ The Joint Appendix to the Briefs of Plaintiff-Appellant Gregory Lumber Co. and Defendant-Appellee United States in the Court

state that it had "inspected" the timber. BLM set forth internal accuracy standards between ±5% and ±10% in its manuals on the measurement of timber and the appraisal of its value in the marketplace.

BLM's defense was that the shortages were due to differences between the way BLM and industry measure timber, and, further, that the disclaimers as a matter of law absolved BLM of any responsibility no matter the severity of the shortage in recovery.

Gregory sought relief before administrative boards and before the U.S. Court of Claims. Although limited discovery was allowed in 1986, no evidentiary hearing was granted and no oral argument held on the legal significance of 55 exhibits and 2327 pages of evidence submitted in opposition to the motions for summary judgment.

Gregory argued that application of the Uniform Commercial Code ("U.C.C.") as a unified body of law to these transactions in which the United States acted as a merchant required striking the disclaimers which, according to the Claims Court, constituted an absolute bar to relief. Gregory also asserted that the use of the words "more or less" and "approximately" in the contract documents meant "slight" variations not shortages as high as 50%. Trade usage also supported Gregory's interpretation of these contract terms. The decision of the Claims Court rendered the disclaimer clause a virtual denial of any BLM contractual obligation.

The Claims Court relied upon its own precedents and neither recognized nor discussed the precedents from this Court and other jurisdictions relied

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of Appeals for the Federal Circuit Docket #87-1208 will hereinafter be referenced as "App. at ___".

upon by Gregory. Appeal was taken to the U.S. Court of Appeals for the Federal Circuit which affirmed *per curiam* without opinion.

Gregory seeks review of the decision, because the Federal Circuit is in conflict on all issues with this Court, with other Federal Courts of Appeals, and with Supreme Courts of states.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

I. THE FEDERAL CIRCUIT IS IN CONFLICT WITH THIS COURT, OTHER CIRCUITS AND STATE COURTS AS TO WHETHER THE UNITED STATES CAN BY CONTRACT DISCLAIM ITS "ESTIMATES" OF QUANTITY, WHERE THE "ESTIMATES" OF QUANTITY WERE USED TO CALCULATE A REQUIRED MINIMUM BID PRICE IN AUCTIONS WITH RESERVE.

A. The Federal Circuit's holding in Gregory is in conflict with prior holdings of this Court as to the Federal law merchant and is a significant Federal question which requires clarification by this Court.

The Court of Appeals for the Federal Circuit ruled in the instant case that, under both the common law and the Uniform Commercial Code, disclaimers of warranty as to quantity, quality, merchantability, and fitness for a particular purpose exculpate the BLM, as a seller of trees, from any obligation to tender any performance to the purchaser. If taken to the logical extreme, the disclaimers

render utterly meaningless the specific quantities set forth in a variety of BLM contract documents used in the process of contract formation leading to this dispute. App. at 106, 107, 109. The Federal Circuit has, in effect, stated that BLM, as seller, was not obligated to tender anything at all to buyers because it required acceptance by Gregory of disclaimers of warranties and required Gregory to warrant that the tracts had been "inspected." App. at 070, § § 6(A) and (B).

The contract documents were *all* drafted by BLM. The disclaimers were introduced at the very last stage of the "bargaining" process, after Gregory had used BLM's representations and "estimates" of timber quantity to calculate minimum bid prices required for the BLM auctions with reserve.

A merchant-seller cannot in good faith disclaim his negligent or intentional misrepresentations of fact particularly when the disclaimer is contained in a contract drafted entirely by seller. In U.C.C. § 2-103(1)(b) "Definitions and Index of Definitions," the Code sets forth the standard of behavior required of a merchant:

> "Good faith" in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.

Furthermore with reference to resolving such problems of interpretation, in *O'Brien v. Miller*, 168 U.S. 287, 297 (1892), this Court restated the rules of contract interpretation:

> The elementary canon of interpretation is, not that particular words may be isolatedly considered, but that the whole contract must be

> brought into view and interpreted with reference to the nature of the obligations between the parties, and the intention which they have manifested in forming them.

In *O'Brien*, this Court relied upon three of its previous decisions when it set forth this canon of interpretation, *supra*. *Boardman v. Reed*, 31 U.S. 328 (1832), *Canal Co. v. Hill*, 82 U.S. (15 Wall) 94 (1872), and *Rock Island v. Rio Grande Railroad*, 143 U.S. 596 (1892).

The Federal Circuit has first of all failed to follow precedents of this Court which stated that a contractor has a right to rely reasonably upon such representations of the U.S. Government when making bids. *United States v. Stage Co.*, 199 U.S. 414 (1905); *Hollerbach v. United States*, 233 U.S. 165 (1914); *Christie v. United States*, 237 U.S. 234 (1914); *United States v. Spearin*, 248 U.S. 132 (1918); and *United States v. Atlantic Dredging Co.*, 253 U.S. 1, 11 (1920).

In *Atlantic Dredging*, this Court found that despite a direction to contractors to inspect the site for dredging and to inform themselves of conditions, such a direction would not relieve the United States from defects in its plans and specifications. 253 U.S. at 11. Similarly, the Federal Circuit should have found that the estimates of quantity upon which BLM relied to calculate a minimum price were sufficient to constitute representations to Gregory that both the trees and an ascertainable quantity of timber were actually there. Instead, the Federal Circuit refused to apply the canons of contract interpretation set forth by this Court.

B. The decision of the Federal Circuit is in conflict with decisions of the Fourth, Eighth and Ninth Circuits which relied upon prior rulings of this Court.

The decision of the Federal Circuit is in conflict with the Ninth Circuit which found in *United States v. Lundstrom*, 139 F.2d 792 (9th Cir. 1943), that despite the fact that a contractor was instructed to investigate conditions he nevertheless had a right to rely upon U.S. Government representations. The Ninth Circuit in affirming the decision of the District Court in Oregon in *Lundstrum*, 53 F.Supp. 709 (D.Or. 1941) relied upon the *Stage Co.*, *Hollerbach*, and *Christie* cases cited *supra*.

The Oregon District Court in *Lundstrom*, *supra*, also relied upon *Hollerbach v. United States*:

> The contracts of the United States with one of its citizens are construed according to the ordinary rules of contracts which apply between individuals. 53 F. Supp. at 711 n. 2 (D.Or. 1941)

In another decision of the Ninth Circuit, *Lowell O. West Lumber Sales v. United States*, 270 F.2d 12 (9th Cir. 1959), it was held that under the proper circumstances, the court could look to documents other than a contract to supply the circumstances surrounding the bargaining process for proper interpretation of a contract, if there were any ambiguity. Gregory contended that the disclaimers introduced by BLM in the final contract documents for the first time in the ongoing transaction were in direct conflict with other preceding contractual

documents. The contract files included more than thirty discrete forms, *all* drafted by BLM. Any conflict or ambiguity in these forms should have been resolved in favor of Gregory not BLM, the drafter. The Federal Circuit and the Claims Court failed to examine the contract documents for conflict or ambiguity.

In *Giustina v. United States*, 190 F.Supp. 303 (D.Or. 1960), the District Court for Oregon relied on *Lundstrom*, *West*, and *Reconstruction Finance Corporation v. Sullivan Mining Co.*, 230 F.2d 247 (9th Cir. 1956):

> Where a contract between a Federal agency and a private corporation was written in its entirety by the agency, its language would be construed most strongly against such agency. *Id.* at 308.

The Federal Circuit is also in conflict with the *Fourth Circuit* which rendered a judgment on a U.S. General Services Administration ("GSA") warranty disclaimer in *Eastern Service Management Company v. United States*, 363 F.2d 729 (4th Cir. 1966). In a contract for cleaning services, the GSA attempted to disclaim its own estimates of floor space to be cleaned in an office building by requiring that prospective bidders investigate the site. The Fourth Circuit was not receptive to GSA's argument that because of the "inspection" clause, bidders had thereby assumed the risk of relying upon GSA's estimates of floor space. Here, also, the court relied upon *Lundstrom*, *Hollerbach*, and *Moore v. United States*, 196 U.S. 157 (1905).

The Federal Circuit is in conflict with the *Eighth Circuit* as to whether or not the government can disclaim its own estimates or representations. In *Mandel, Inc. v. United States*, 424 F.2d 1252 (8th Cir. 1970), the

Eighth Circuit relied upon *Eastern Service Management*, *Hollerbach*, *Christie*, and *Atlantic Dredging*:

> Caveatory and exculpatory contractual provisions will not shift the liability flowing from an express or implied representation made by the Government and reasonably relied upon by the contractor. *Id.* at 1255.

C. The Federal Circuit is in conflict with decisions of the courts of Arkansas, California, and Oregon.

1. Identification of Goods (U.C.C. § 2-501) and Express Warranties (U.C.C. § 2-313)

In order to bid, Gregory had to pay a minimum price in the auctions with reserve. App. at 108. Gregory contends that the goods had to be identified to justify the minimum bid price. The Court of Claims failed utterly to address Gregory's claim that the goods must be identified to the contract pursuant to U.C.C. § 2-501, "Insurable Interest in Goods; Manner of Identification of Goods." The Federal Circuit did not look to the substance of the transaction but examined only its outward form. The disclaimers of warranty as to quantity, quality, merchantability and fitness for a particular purpose contained in BLM's contract form were in conflict with the highly detailed numbers of trees, estimates of timber volume per tree, and minimum prices per board foot per species set forth in the contract documents and prospectus. Other documents included the

Timber Sale Notices and Prospecti which induced Gregory's participation in the auction sales program. App. at 106-107.

The Timber Sale Notices and Prospecti used by BLM created an express warranty by their descriptions of the goods therein described. U.C.C. § 2-313(1)(b) "Express Warranties by Affirmation, Promise, Description, Sample" states:

> Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

This provision was construed in *Whitaker v. Farmhand, Inc.*, 173 Mont. 345, 567 P.2d 916 (1977). Official Comment 4 to § 2-313 further states in support of Gregory's position:

> A clause generally disclaiming `all warranties, express or implied' cannot reduce the seller's obligation with respect to such description and therefore cannot be given literal effect under Section 2-316.

U.C.C. § 2-313, Official Comment 4 (1977).

The Supreme Court of Oregon in *Autzen v. John C. Taylor Lumber Sales, Inc.*, 572 P.2d 1322, 1325 (Or. 1977), stated that a warranty by description could be created by seller, if the seller introduced said description into the bargaining process. This is precisely what BLM did. The concept of a sale by description was codified in the Uniform Sales Act of 1906 as drafted by Professor Williston in Section 14 "Implied Warranty in Sale by Description." "Sale by

description" is a term which appears frequently in old legal digests and in the headnotes of timber and logging cases decided in the Nineteenth Century, and which persists due to the inherent common sense of the concept.

2. Disclaimer of Warranties (U.C.C. §2-316)

By its insertion of a purchaser's warranty of inspection in Section 6A of the contract, App. at 070, and of the disclaimers in Section 6B of the contract, App. at 070, BLM introduced an element into the agreement which contradicted the hundreds of pages of specific figures contained in the contract files. By approving such a practice, the Federal Circuit has placed itself in conflict, not only with commercial trade practice prevalent in Oregon, but also with state appellate level courts:

> Where the conflict is between a written disclaimer and other written assertions which are part of the contract, courts have generally held that the disclaimer is ineffective. *Miller v. Hubbard-Wray Co.*, 630 P.2d 880, 883 (Or.Ct.App. 1981).

For this holding on the meaning of a disclaimer drafted in conformity with U.C.C. §2-316, "Exclusion or Modification of Warranties", the Oregon Court of Appeals cited *Woodruff v. Clark Co. Farm Bureau*, 153 Ind. App. 13, 286 N.E.2d 188, 200 (1972). In circumstances analogous to Gregory's, the Court of Appeals of Indiana held that one way the validity of a disclaimer could be tested would be to look at the point in the transaction at which the

disclaimer was introduced to the party required to accept it. In Gregory's case, the disclaimers appeared in small print in the final document after both the auction and the calculation by Gregory of a minimum bid price in reliance upon BLM's very specific numbers.

In *Miller, supra*, the Oregon Court of Appeals also relied on the case of *Whitaker v. Farmhand, Inc.*, 173 Mont. 345, 567 P.2d 916 (1977). In *Whitaker*, the Supreme Court of Montana struck down a warranty disclaimer which had been placed in a manual for assembling a sprinkler system in an attempt to invalidate representations in an advertising brochure.

The Oregon Court of Appeals in *Miller* also relied upon a decision of a Texas appellate court for the proposition that it is material to the construction of a contract whether or not certain terms have been discussed or agreed upon. In *Mobile Housing, Inc. v. Stone*, 490 S.W.2d 611 (Tex.Civ.App. 1973), the Court of Civil Appeals of Texas chose to examine the substance rather than the procedure of a transaction for the sale of a mobile home and concluded that a description of goods creates an obligation on the part of seller which cannot be disclaimed:

> The code according to Comment 4 under § 2.313 seems to take the view that the whole purpose of the law of warranty is to determine what it is that the seller has in essence agreed to sell, and refuses except in unusual circumstances to recognize a material deletion of the seller's obligation. Thus, a contract is normally one for a sale of something describable and described. A clause *generally disclaiming "all warranties, express or implied," cannot reduce the seller's obligation*

> *with respect to such description and therefore cannot be given literal effect under* § *2.316. Mobile Housing, Inc. v. Stone*, 490 S.W.2d 611, 615 (Tex.Civ.App. 1973). (Emphasis supplied.)

Gregory has contended that BLM, by the use of disclaimers, tried to impose a controlling procedural overlay on the substance of the transactions, thereby twisting the meanings of terms used in the Oregon timber trade. BLM labelled its timber contracts "lump sum" sales, but required payment from Gregory in installments in a manner similar to that described in U.C.C. § 2-612, "Installment Contract, Breach." App. at 108. The installments were calculated upon an average volume of wood per acre *before* the wood became the property of purchaser. Calling such sales "lump sum" is absurd. Nevertheless, this practice has been permitted by the Federal Circuit directly in conflict with the Supreme Court of Oregon.

In *Libby Creek Logging, Inc. v. Johnson*, 358 P.2d 491 (Or. 1960), the Supreme Court of Oregon relied upon old Oregon case law, and trade custom and usage to look into the substance of a "lump sum" transaction and the reasonable expectations of the parties:

> A misrepresentation as to the quantity of real property including timber furnishes a proper basis for the recovery of damages for fraud even though the sale was in gross for a lump sum in the instant case. *Libby Creek Logging, Inc. v. Johnson*, 358 P.2d 491, 495 (Or. 1960), *citing Heise v. Pilot Rock Lbr. Co.*, 352 P.2d 1072; *Selman v. Shirley*, 85 P.2d 384, *on reh.* 91 P.2d 312, 124 A.L.R. 1, 16 (1938).

Assuming *arguendo* that the transactions in the instant case were truly "lump sum" sales, as characterized by the Federal Circuit, the Court should still have found that the seller, BLM, made actionable misrepresentations for which purchaser could make a recovery pursuant to U.C.C. § 2-721, "Remedies for Fraud."

Finally, the Federal Circuit is in conflict with the courts of California which have held, that despite technical compliance with the disclaimer requirements of the U.C.C. a disclaimer can be rendered unenforceable because of unfairness. *A & M Produce Co. v. FMC Corp.*, 186 Cal. Rptr. 114, 120 (Cal.Ct.App. 1982).

II. THE FEDERAL CIRCUIT IS IN CONFLICT WITH THIS COURT AS TO THE LEGAL SIGNIFICANCE OF THE TERMS "MORE OR LESS" AND "APPROXIMATELY" AS INTERPRETED BY THIS COURT. THE FEDERAL CIRCUIT'S DECISION PERMITS SHORTAGES IN QUANTITY AS HIGH AS 50% IN U.S. CONTRACTS.

The decision of the Claims Court, 11 Cl.Ct. 489 (1986), affirmed by the Federal Circuit, is in conflict with prior rulings of this Court which interpreted the terms "more or less," "about," and "approximately." This Court in *Brawley v. United States*, 96 U.S. 168 (1877), stated the rule by which the Federal Circuit should have been guided but which it contradicted:

> The addition of the qualifying words "about," "more or less," and the like in such cases is only for the purpose of providing against accidental

> variations arising from slight and unimportant excesses or deficiencies in number, measure or weight. 96 U.S. at 172.

Justice Bradley's reasoning was followed subsequently in *Norrington v. Wright*, 115 U.S. 188 (1885), *Filley v. Pope*, 115 U.S. 213 (1885) and *Pine River Logging Co. v. United States*. 196 U.S. 157 (1904).

The Timber Sale Notices and Prospecti which induced Gregory to make a mandatory bid deposit for participation in auction sales of timber used the terms "more or less" and "approximately" many times. The process of contract formation between BLM and Gregory relied heavily upon the specific numbers set forth in the Timber Sale Notices and Prospecti which numbers were used to calculate both BLM's minimum bid price and Gregory's bid at auction. App. at 106-109. In short, the figures and the prices calculated therefrom formed the basis of the bargain. It was only at the last stage of the bargaining process that the Bureau of Land Management inserted a disclaimer of warranties.

Timber recovery shortages averaging 26% for the 12 contracts and running as high as 50% exceeded any reasonable concept of "slight" variations. The Federal Circuit considered these shortages averaging 26% in millions of board feet as being well within the meaning of "more or less," "about," and "approximately."

The Federal Circuit has construed the meaning of these terms in conflict with the decision by the Fourth Circuit in *Eastern Service Management Company v. United States*, 363 F.2d 729 (4th Cir. 1966). In *Eastern*, a cleaning service contractor entered a bid to clean office space occupied by the Internal Revenue Service. According

to both the District and Circuit courts, a variance of 8700 square feet or 6% in excess of the U.S. Government's estimate of 129,300 square feet was not within the meaning of "approximately." As stated by the court in *Eastern*:

> The government cannot avoid this reliance by instructing bidders to visit the building to ascertain the nature and location of the work, and the general local conditions which can affect the work and the cost thereof. *Id.* at 731.

The Fourth Circuit in *Eastern* relied, in turn, upon a Ninth Circuit decision, *United States v. Lundstrom*, 139 F.2d 792, 794 (9th Cir. 1943), as to a bidder's right to rely upon figures supplied by the government when computing bids for a contract.

Further authority for the legal theory that "more or less" covers accidental or slight variations is *Budge v. United Smelting and Refining Co.*, 104 F. 498 (9th Cir. 1900) which relied upon the *Brawley* decision for its interpretation of "more or less." *Brawley* was also cited as authority in *United States v. Republic Bag and Paper Co.*, 250 F. 79 (2d Cir. 1918) in which the Second Circuit also cited the *Norrington* and *Pine River Logging Co.* cases for the proposition that:

> [w]hen the only measure is the estimate itself, they allow only a small latitude of variation, much within that here asserted. *United States v. Republic Bag and Paper Co.*, 250 F. at 81.

The Republic Bag and Paper Co. case relied upon a decision to the same effect rendered by the Eighth Circuit in *Hadley*

Dean Plate Glass Co. v. Highland Glass Co., 143 F. 242 (8th Cir. 1906).

III. THE FEDERAL CIRCUIT IS IN CONFLICT WITH THIS COURT, OTHER FEDERAL CIRCUITS AND STATE COURTS AS TO WHETHER THE UNIFORM COMMERCIAL CODE SHOULD BE APPLIED AS A UNIFIED BODY OF LAW TO A CONTRACT DRAFTED BY THE UNITED STATES GOVERNMENT.

A. The Federal Circuit's holding in Gregory is in conflict with prior holdings of this Court as to the application of the U.C.C. as a unified body of law.

This Court ruled on the commercial law applicable to U.S. negotiable instruments in *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842). Justice Story stated that the Court could draw upon general principles and doctrines of commercial jurisprudence to create, in effect, a "federal law merchant." In 1938, Justice Brandeis adopted a different view:

> There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state whether they be local in nature or "general" be they commercial law or a part of the law of torts. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

In *Erie*, Justice Brandeis made it clear that henceforth the Federal Courts would construe substantive

state law and use the new Federal Rules of Civil Procedure in a uniform manner. Notwithstanding *Erie*, as discussed below there were and still are certain areas of law which are uniquely "federal" and among these areas are government contracts, admiralty, and commercial paper, when issued by the United States.

For example, in *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943), Justice Douglas found that *Swift v. Tyson* was "a convenient source of reference for fashioning federal rules applicable to these federal questions." He relied upon Federal statutes, regulations promulgated by the Department of the Treasury, and "general" principles of banking law. Four years later, Justice Rutledge relied upon *Clearfield* to fashion a similar governing rule of law in *United States v. Standard Oil Co. of California*, 332 U.S. 301 (1947).

The U.C.C. evolved, *inter alia*, from the Uniform Sales Act of 1906, the Negotiable Instruments Law and the English Sale of Goods Act. The drafting of the Code and its adoption by the state legislatures required more than fifty years. The drafters of the U.C.C. and its antecedents drew from the experience of the English, the French, and the German communities for guidance when they were creating a comprehensive model for commercial transactions. From the outset, the purpose of the drafters was to facilitate the growth of a national economy rather than merely regional spheres, or markets.

The Uniform Commercial Code has now been adopted in 49 states, the District of Columbia, and by the Department of Interior's Board of Contract Appeals in *Federal Pacific Electric Co.*, No. 334, Interior BCA, 33 U.S.L.W. 2222 (October 23, 1964). However, in this case, BLM has argued for a very narrow application of the U.C.C.

The portions of the U.C.C. placed at issue by Gregory below in the Court of Claims and the Federal Circuit were Articles 1 and 2 of the U.C.C., "General Provisions" and "Sales" respectively. By the terms of § 1-104, the sections of the Code are to be applied as a "unified coverage of its subject matter...." Furthermore, general supplementary principles of law were incorporated into the Code by reference in § 1-103. When Gregory sought to have the U.C.C. applied as a unified body of law to the U.S. contracts at issue, the appeal was treated as a matter of first impression for lack of precedents in the Federal Circuit. The Federal Circuit and the Claims Court ruled on only one issue, unconscionability, rather than applying Articles 1 and 2 of the U.C.C. to the entire contract.

The common law principles expressed in the U.C.C. do not substantially vary from the principles set forth by this Court in its decisions. Nevertheless, the Federal Circuit has steadfastly refused to give any recognition to case law developed elsewhere upon which precedents Gregory relied when making its arguments. Clearly, the U.C.C. like its predecessor uniform acts should be considered as an important source of law and principle for fashioning the federal law of sales when interpreting government contracts.

B. The decision of the Federal Circuit is in conflict with the Second and Third Circuits, which relied upon prior rulings of this Court, in using the Uniform Commercial Code and the Uniform Sales Act as a source of law for the federal law of sales.

In its decision, 11 Cl.Ct. at 489, of December 29, 1986, the U.S. Claims Court failed to apply all of the

provisions of the Uniform Commercial Code which pertain to buyer's, *i.e.* Gregory's, remedies under Article 2. By affirming the Claims Court decision without comment on September 1, 1987, the Federal Circuit placed itself squarely in conflict with decisions of other U.S. Circuit Courts of Appeals and failed to follow precedents established by this Court.

The late Judge Friendly of the Second Circuit cited the Uniform Commercial Code as a source of law for the "federal" law of sales:

> When the states have gone so far in achieving the desirable goal of a uniform law governing commercial transactions, it would be a disservice to insist on a different one for the segment of commerce, important but still small in relation to the total, consisting of transactions with the United States. *United States v. Wegematic Corporation*, 360 F.2d 674, 676 (2d Cir. 1966).

Judge Friendly used the Code at the suggestion of defendant in that case, while relying upon Judge Learned Hand's decision in *New York, N.H. and H.R. Co. v. Reconstruction Finance Corporation*, 180 F.2d 241 (2d Cir. 1950), as a precedent. Judge Hand in the latter case applied the Negotiable Instruments Law to a dispute between a railroad and a federal agency acting in its proprietary capacity. Judge Hand relied upon this Court's decision in *Standard Oil*, *supra* for guidance in fashioning a rule of law in an area where state law would not control, but where, nevertheless, a uniform act adopted by the states might prove to be a valuable source of law and principle.

Perhaps, Judge Friendly anticipated the *Wegematic* case when he commented in 1964 on the impact of the *Erie* decision and the way that it might change commercial law:

> Here the effort for uniformity once the limited value of Story's approach was recognized, has taken the form of an endeavor to secure the passage of various uniform acts, and now of the Uniform Commercial Code. The difficulty in getting uniform acts adopted by fifty state legislatures, the even greater difficulty in getting them adopted uniformly, the sheer impossibility of getting unruly judges to interpret them uniformly, and the felt necessity of resisting desirable amendments in order to protect the uniformity so hardly won do not require elaboration. Friendly, *In Praise of Erie and of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383, 419 (1964).

Judge Friendly, who clerked for Justice Brandeis, commented on government contracts, in his words, "a restricted area":

> Because of the presence of a federal question most of the litigation is likely to be in the federal courts, which thus have an opportunity to develop a set of rules as to what issues should be left to state law, and also a body of federal law on those issues where national uniformity is demanded. *Id.* at 411.

Gregory cites as authority decisions of this Court pertaining to the purchase of goods or services by the federal government. *See, e.g., United States v. Stage Co.*, 199 U.S. 414 (1905); *Hollerbach v. United States*, 233 U.S. 165 (1914). Gregory sought to purchase goods *from* the federal government and to provide road construction services to the federal government according to BLM's specifications. The Federal Circuit has juxtaposed the inapposite standards of sovereign immunity upon the ordinary contractual obligations undertaken by BLM when authorized to act in its proprietary capacity as a seller of trees. As stated by Judge Friendly the U.C.C. provides a necessary frame of reference for determining both the proper obligations of and remedies for the parties. However, the Federal Circuit is not free to use the U.C.C. as it sees fit by resolving disputes in conflict with this Court and the other Federal Courts.

The Third Circuit in *Campbell Soup v. Wentz*, 172 F.2d 80 (3d Cir. 1948), resolved a diversity case between two private parties by drawing upon the Uniform Sales Act as then adopted by Pennsylvania and New Jersey. The Court took notice of *Erie* and also the fact that it was the role of a federal court to fashion relief. *Id.* at 81. Although the instant dispute is one between the federal government and a private party, the method of resolving the dispute should not differ substantially from the resolution of disputes between individuals because the U.S. is a merchant when it sells goods.

In the *United States v. Stage Company*, 199 U.S. 414 (1905), this Court stated:

> The same principles of right and justice which prevail between individuals should control in the construction and carrying out of contracts

between the government and individuals. *Id.* at 423.

This proposition was followed subsequently in *Hollerbach v. United States*, 233 U.S. 165 (1914) and *United States v. Standard Rice Co.*, 323 U.S. 106, (1944).

C. The Federal Circuit is in conflict with decisions of Appellate and Supreme Courts of Arkansas, California, and Oregon in interpreting U.C.C. Articles 1 and 2 as to the obligation of good faith, limitation of remedies, and unconscionability.

1. Obligation of Good Faith

The Claims Court, in its decision, affirmed by the Federal Circuit, described as "complicated" the application of the U.C.C. to a federal contract, 11 Cl.Ct. 489 (1986). The Claims Court had ruled only on the narrow issue of "unconscionability" as set forth in U.C.C. § 2-302, while utterly ignoring the more basic breach of contract claims made in the original and amended petitions.

When he rendered a decision permitting limited discovery at January 31, 1986, at 9 Cl.Ct. 503 (1986), the judge commented that there was no remedy provision included in the contracts which are the basis for this controversy. Curiously, less than a year later, when the Claims Court granted BLM's motions for summary judgment, the court refused to address the fundamental inequity of a contract without a remedy under the U.C.C. § 2-719. The Court admitted that Gregory's claims were for "tortious breach of contract," and were based in part on the

BLM's breach of its obligation to act in "good faith." 9 Cl.Ct. 503, 509 (1986). Professor Farnsworth summarized the essence of good faith as set forth in the U.C.C.

> Good faith performance has always required the cooperation of one party where it was necessary in order that the other might secure the expected benefits of the contract. And the standard for determining what cooperation was required has always been an objective standard, based on the decency, fairness or reasonableness of the community and not on the individual's own beliefs as to what might be decent, fair or reasonable. Farnsworth, *Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code*, 30 U.Chi.L.Rev. 666, 672 (1963).

In denying that a cause of action existed for breach of that obligation, the Federal Circuit is in conflict with the Court of Appeals of Oregon, which stated that despite the failure of Plaintiff's unconscionability claim that the Plaintiff would still have an actionable cause on the basis of a simple claim of breach. Furthermore, the Oregon court found:

> Every contract contains an implied covenant of good faith and fair dealing.... When that covenant is breached, the nonbreaching party may bring an action for breach of contract.... Whether a party has breached the covenant of good faith and fair dealing is a question of fact.

Best v. United States National Bank of Oregon, 714 P.2d 1049, 1056 (Or.App. 1986).

The Federal Circuit in the Gregory case applied an inapposite standard of "bad faith" drawn from libel cases filed against public officials in rejecting Gregory's allegations of "bad faith" in a commercial setting, stating that Gregory would have had to show "actual malice" to sustain a cause of action. That proposition is in conflict with the meaning of "good faith" set forth in U.C.C. §§ 1-201(19), 1-203, and 2-103(1)(b). Gregory alleged that the U.S., as a merchant, breached its obligation to act honestly in fact and to observe the obligations historically imposed by the law merchant. Such allegations constituted a meritorious cause of action.

The Federal Circuit demonstrated a confused understanding of the respective meanings of "good faith" on the part of public officials in the performance of their duties, and "bad faith" in a commercial setting when it affirmed the decision of the Claims Court. By so doing, the Federal Circuit placed itself in conflict with the Supreme Court of Oregon which found that a claim for breach of the merchant's implied obligation of good faith and fair dealing would be actionable despite the failure of a claim of unconscionability. *W. L. May Co., Inc. v. Philco-Ford Corporation*, 543 P.2d 283, 288 (Or. 1975). In *W. L. May*, the Supreme Court of Oregon relied upon *Campbell Soup Co. v. Wentz*, 172 F.2d 80 (3d Cir. 1948) for a test of "unconscionability" in commercial transactions under the Uniform Sales Act as adopted by Pennsylvania and New Jersey. The Third Circuit also looked to the Restatement of Contracts for guidance in deciding the *Wentz* case.

2. Limitation of Remedies

In the January 31, 1986 decision granting Gregory limited discovery, the Claims Court stated that: "no part of the contracts, expressly or by implication, contains specific adjustment provisions aimed at remedying recovery of timber shortfalls of any kind." 9 Cl.Ct. at 519. In other words, there was no remedy for a shortage no matter how severe. The lower court failed to make any further examination of the effect of such severe limitations of remedy in the contract as it should have pursuant to U.C.C. § 2-719, "Contractual Modification or Limitation of Remedy." By allowing such an omission, the Federal Circuit placed itself in conflict with the Supreme Court of California. See *A & M Produce Co. v. FMC Corp.*, 186 Cal. Rptr. 114 (Cal.Ct.App. 1982).

The Federal Circuit, by its affirmation of the lower court holding, applied sections of the U.C.C. to the BLM's contract form as if the sections were meant to be read in a selective and disjunctive manner and not as a unified body of law. Such an interpretation of the U.C.C. is in conflict with the very purpose of drafting such a comprehensive Code, whose sections were designed to be complementary, *not* alternatives to be applied subjectively at the whim of the Court.

Gregory argued that the Defendant breached its obligation of "good faith" *and* that the totality of circumstances were procedurally and substantively unconscionable. Gregory argued that the limitation of remedies contained in the contract form was so severe as to cause the bargain and the "remedy" to fail of their essential purposes. Further, Gregory pointed out that the conflict between specific BLM calculations on the one hand and the

disclaimers of warranty could be resolved only by invalidating the disclaimers in favor of a remedy for the large shortages. This rule of law has historically been accepted by courts which have examined such problems with the exception of the Federal Circuit.

3. Unconscionability Under the U.C.C.

The Federal Circuit is in conflict with the California Court of Appeals which decided that a contract drafted by a large diversified corporation and used with a much smaller purchaser was "unconscionable" on grounds similar to those cited by Gregory before the Federal Circuit:

> [C]ourts view businessmen as possessed of a greater degree of commercial understanding and substantially more economic muscle than the ordinary consumer. Hence, a businessman usually has a more difficult time establishing procedural unconscionability in the sense of either "unfair surprise" or "unequal bargaining power".... Nevertheless, generalizations are always subject to exceptions and categorization is rarely an adequate substitute for analysis. With increasing frequency, courts have begun to recognize that *experienced but legally unsophisticated businessmen* may be unfairly surprised by unconscionable contract terms ... and that even large business entities may have *relatively* little bargaining power, depending on the identity of the other contracting party and the commercial circumstances surrounding the agreement. *A & M Produce Co. v. FMC Corp.*,

186 Cal. Rptr. 114, 124 (Cal.Ct.App. 1982). (Emphasis added.)

Gregory's arguments in the lower court were on all fours with the reasoning of the California Court of Appeals in *A & M Produce*. The relative strength of the United States acting through BLM versus that of Gregory was never addressed by the courts below. *See Davis v. Kolb*, 563 S.W.2d 438 (Ark. 1978).

In Mallor, *Unconscionability in Contracts between Merchants*, 40 SW.L.J. 1065 (1986), the author demonstrated that courts have addressed the concept of "unconscionability" in contracts not only between merchants and consumers as in *Williams v. Walker-Thomas Furniture Company*, 350 F.2d. 445 (D.C.Cir. 1965), but also in contracts between merchants, as cited by Gregory. BLM knew or had reason to know that timber was becoming very difficult, if not impossible, for small businesses to obtain from any source other than the U.S. Government. In 1959, the Supreme Court of Oregon took judicial notice of this fact in *Paullus v. Yarbrough*, 347 P.2d 620, 635 (Or. 1959):

> Although timber and the logs cut therefrom may not be regarded as unique "chattels" we can take judicial cognizance of the fact that it is becoming increasingly difficult for small operations such as the plaintiff to obtain tracts of timber within their purchasing power. *Id.* at 635.

What was true in 1959 had certainly become a progressively more critical concern for small businessmen 20 years later when Gregory bid on these contracts. Gregory sustained an aggregate shortage of 26% in 12 contracts which

was not commercially reasonable. The reality of the marketplace in Oregon is that the small businesses which participated in the BLM set-aside program had to deal with BLM despite the fact that they never got the quantity of timber they "bargained" for. Consequently, they went bankrupt, or, if they were fortunate, simply closed their doors.

CONCLUSION

For the above stated reasons, Gregory respectfully requests the Court to issue a writ of certiorari to the Court of Appeals for the Federal Circuit on issues I, II, and III.

Respectfully submitted,
Edward F. Canfield
CASEY, SCOTT & CANFIELD, P.C.
Counsel of Record
For Petitioner
Gregory Lumber Company

Dated: November 25, 1987

APPENDIX

Note: This opinion has not been prepared for publication in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent. The decision will appear in tables published periodically.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

87-1208

GREGORY LUMBER CO., INC.,

Plaintiff-Appellant,

v.

THE UNITED STATES,

Defendant-Appellee.

DECIDED: September 1, 1987

Before DAVIS, Circuit Judge, BALDWIN, Senior Circuit Judge, and SMITH, Circuit Judge.

Gregory Lumber Company (Gregory) appeals from the grant of summary judgment to the United States by the United States Claims Court in Gregory Lumber Co. v. United States, 11 Cl. Ct. 489 (1986) (Gibson, J.). The Claims Court held that Gregory failed to meet its burden of establishing the existence of genuine issues of material fact as required by Rule 56(e) of the United States Claims Court. On the basis of the Claims Court's opinion, said judgment, dated December 29, 1986, is affirmed.

IN THE UNITED STATES CLAIMS COURT

Nos. 428-80 C, 532-80 C, 578-80 C, 626-80 C, 627-80 C, 628-80 C, 637-80 C, 134-81 C, 135-81 C, 136-81 C, 137-81 C, and 146-81 C

GREGORY LUMBER COMPANY, INC.

JUDGMENT
Filed DECEMBER 29, 1986

v.

THE UNITED STATES

Pursuant to the opinion of December 29, 1986, directing entry of judgment,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that the complaints are dismissed as to dockets 428-80 C, 578-80 C, 626-80 C, 627-80 C, 628-80 C, 637-80 C, 135-81 C, 136-81 C, and 137-81 C. Costs to the prevailing party.

Frank T. Peartree
Clerk of Court
By: /s/
Deputy Clerk

December 29, 1986

NOTE: As to appeal, 60 days from this date, see FRAP 4(a)

IN THE UNITED STATES CLAIMS COURT

Nos. 428-80C, 532-80C, 578-80C, 626-80C, 627-80C, 628-80C,637-80C, 134-81C, 135-81C, 136-81C, 137-81C, and 146-81C

(Filed: December 29, 1986)

GREGORY LUMBER COMPANY, Inc.,
Plaintiff

v.

THE UNITED STATES,
Defendant

Timber sales contracts; lump sum contracts; jurisdiction premised on Tucker Act and Contract Disputes Act; motion for summary judgment; existence of genuine issues of material fact; standard for determining based on Celotex Corp. v. Catrett, 106 S.Ct. 2548 (June 25, 1986); bad faith, misrepresentation in the inducement; disclaimer of warranty of quantity and warranties against reliance -- unconscionability.

Edward F. Canfield, Washington D.C., attorney of record for plaintiff.

E. Kathleen Shahan, Washington, D.C., with whom was Assistant Attorney General Richard J. Willard, for defendant.

OPINION

GIBSON, Judge:

I. INTRODUCTION

This case, involving 12 docketed claims[1] filed originally in the predecessor Court of Claims intermittently over the period August, 1980 through March, 1981, once again comes before the court pursuant to defendant's 1983 unified motion for summary judgment. Defendant, by said motion, pursues the dismissal of all claims remaining following this court's earlier opinion of January 31, 1986. See, Gregory Lumber Co. v. United States, 9 Cl. Ct. 503 (1986). That January 31, 1986 opinion entered a jurisdictional dismissal of several counts of plaintiff's amended petitions,[2] remanded a minor claim to the U.S. Department of Interior Board of Land Appeals, and concomitantly stayed a resolution of defendant's summary

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1/ See Appendix A attached which is a summary schedule listing all of the docketed claims filed. Said attachment also contains other pertinent data such as docket numbers, dates claims were filed in the predecessor Court of Claims and before the Interior Board of Contract Appeals (IBCA) and the Interior Board of Land Appeals (IBLA).

2/ Specifically, the January 31, 1986 opinion dismissed on jurisdictional grounds, without prejudice, plaintiff's cause of action based on violation of 43 U.S.C. § 1181(a) (1982), and plaintiff's road design offset claims in dockets 578-80C and 146-81C.

judgment motion as to all other counts in the remaining 11 docketed claims of plaintiff's amended petitions pending a period of limited discovery for plaintiff pursuant to, inter alia, RUSCC 56(f).

Following thereon, plaintiff engaged in such discovery over the period February 1, 1986 through April 15, 1986. Thereafter, both parties supplemented their initial briefs, as required, relative to defendant's pending motions for summary judgment in light of any alleged newly discovered evidence. Surprisingly, plaintiff proffered an additional 75-page memorandum supplemented by an appendix consisting of approximately 2,269 pages, which included eight unexcerpted depositions, various other documents and five affidavits.

As thoroughly analyzed by the court in its opinion of January 31, 1986, the 12 docketed claims in these cases postured an amalgamation of Tucker Act (28 U..C. § 1491 (1982)) and Contract Disputes Act (41 U.S.C. § 609(a)(1) (1982)) jurisdictional issues. At this juncture, of the remaining 12 dockets, 11 aver a separate claim by the contractor, Gregory Lumber Company, for breach of a timber sales contract with the government. The primary thrust of these claims is plaintiff's alleged failure to recover from each purchase the specified amount of timber which was estimated by the government to be recoverable in each contract.[3] Plaintiff contends, through its amended petitions, that these various recovery shortfalls, averaging 26% per

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3/ In 10 of these remaining 11 claims, the contacts were "lump sum" timber sales. However, in the eleventh, i.e., no. 428-80C, the sale was for specifically marked, or specifically identified, trees, and hence, not lump sum.

contract, are the result of either bad faith dealing or misrepresentation by he government or both. Alternatively, plaintiff avers that any contractual disclaimers by defendant and any warranty against reliance by plaintiff, which insulates the government from liability, should be stricken as unconscionable.

Contrary to the other 11 contracts that are lump sum contracts, one of the docketed claims, no. 428-80C (i.e., Dunn Ridge), bases the recovery it seeks on the government's alleged negligence for having failed to mark a number of trees for cutting which had been specifically identified to that contract at the time of sale. Lastly, three of the docketed lump sum contract claims also contain subsidiary performance price adjustment claims,[4] and one, i.e., no. 134-81C, also contains a performance related counterclaim by the government. We underscore, at this posture, the fact that this opinion only resolves those claims asserted by plaintiff relative to the alleged timber shortfalls (i.e., those claims based on bad faith, misrepresentation, breach of warranty, unconscionability, and the negligent marking of trees), and not the subsidiary performance claims.[5]

4/ In docket no. 146-81C, plaintiff asserts a breach claim based on a faulty rock source. In docket no. 134-81C, plaintiff asserts a claim based on a landslide. Lastly, in docket 532-80C, plaintiff seeks recovery based on a warranty of road costs theory.

5/ We proceed in this manner, for a number of reasons, despite the fact that defendant's pending motion addresses the merits of all of plaintiff's subsidiary claims. First, the subsidiary claims are not all in the same jurisdictional posture. One (no. 134-81C) is here for Wunderlich Act review, while others (nos. 146-81C and 532-80C) are here for de nova

Prior to the time these claims were filed in the predecessor Court of Claims, plaintiff also sought and was denied relief by its various contracting officers. Initial decisions by the contracting officers were issued over the period November, 1978 through November, 1979. From these adverse determinations, plaintiff appealed to both the IBLA and the IBCA. The detailed history at the board level, which eventually led plaintiff to seek relief in the predecessor Court of Claims, is exhaustively documented in our earlier opinion of January 31, 1986, supra, which should be read as an integral background to our decision today. See Gregory Lumber Co., 9 Cl. Ct. at 503.

By the opinion, we lift the current stay as to all dockets and address the merits of defendant's motion to dispose summarily of plaintiff's timber underrun claims. It is our considered opinion, following an exhaustive review of all briefs, supplements, and exhibits filed in this matter, and with oral argument, that defendant is entitled to summary judgment (except as otherwise noted) on all of plaintiff's timber underrun claims which are based on bad faith, misrepresentation, breach of warranty, unconscionability, and negligent marking of trees. With respect to said timber underrun claims, quite simply, plaintiff has totally failed to

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review. The chance that discovery may be needed, as well as a subsequent trial on the merits relative to this latter group, has not been ruled out at this time. In addition, to complicate matters even further, the claim contained in docket 134-81C has been remanded to the Interior Board of Land Appeals (in contrast to those other "arising under" claims which were dismissed, without prejudice, in the January 31, 1986 opinion) and remains on our docket for future consideration. Finally, there is the interrelated matter of defendant's counterclaim which is not addressed by either party in any motion currently before the court.

carry its burden, pursuant to RUSCC 56(e), to come forward with "specific facts" establishing the required elements of bad faith or misrepresentation, or at the very least facts sufficient to raise genuine issues of material fact relative thereto. See Celotex Corp. v. Catrett, 106 S.Ct. 2548 (June 25, 1986). Because of such failure of proof, this court is convinced that a trial on the merits on such issues would be totally inappropriate.

Notwithstanding plaintiff's contention that to apply its warranty of inspection and defendant's disclaimers of quantity would be unconscionable, we believe the undisputed facts establish, beyond cavil, that an arm's-length bargain was struck by thoroughly knowledgeable and vastly experienced parties which contained no elements of oppression, surprise, or less than knowing even-handed dealing. The disclaimers are, therefore, fully enforceable to preclude recovery under plaintiff's contention that defendant warranted the estimated quantum. Lastly, in granting defendant's motion for summary judgment relative to the plaintiff's negligent marking of trees cause of action, in docket no. 428-80C, we find that as a matter of law the inspection warranty in plaintiff's contract fully insulates the government even given the non-lump sum nature of this contract. Summary disposition in the government's favor, therefore, is appropriate.

II. BACKGROUND

Each of the 12 docketed cases in issue is premised on a separate contract between the plaintiff and the U.S. Department of Interior, Bureau of Land Management (BLM), for the sale of standing timber. Eleven of said contracts are similar "lump sum" timber sales contracts, and

the twelfth, no. 428-80C, is a salvage sale of specifically marked trees. A lump sum timber contract represents the sale of an unquantified amount of timber which is identified generally only be references to its geographic location (i.e., the sale of such timber located within designated boundaries). See Gregory Lumber Co., 9 Cl. Ct. at 506 n. 1. As mentioned earlier, there are also subsidiary performance claims found in dockets 146-81C (based on inadequate rock source for road construction), 134-81C (based on additional road usage costs due to a landslide), and 532-80C (based on the plaintiff's encountering excess road construction costs). Defendant has asserted a performance counterclaim in docket no. 134-81C.

Said 12 contracts[6] were bid on and entered into from very early in 1975 through about April of 1977, and reflect a

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6/ In order to fully understand the nature of the contracts at issue in this case, some general familiarity with the chronology of a BLM timber sale may be helpful. BLM's timber sales authorized pursuant to the Act of August 28, 1937 (43 U.S.C. § 1181a), as were those to the plaintiff, are governed by the procedures set out in subpart 5400 of volume 43 of the Code of Federal Regulations (CFR) (1976). All sales begin with the formation of a Timer Sale Plan (TSP), which is prepared by the BLM and takes into account suggestions from prospective timber purchasers (§ 5410.0-6 (1976)). Such plan includes an annual listing as to when various tracts of timber, included in the plan, will be offered for sale; an indication whether there will be Small Business set-asides; and finally a description of the probable location and anticipated volumes of such tracts. Id. Once integrated into the TSP, each sale is measured by tree cruise, log scale, weight, or such other form of measurement as may be determined to be in the public interest (§ 5420.0-6). Each of the instant plaintiff's sales was measured by "tree cruise" -- a method which determines sales volume

based on the estimated volume of standing timber. This is the standard BLM method for all timber sales (§ 5422.1).

As the sale date approaches, competitive timber sales are advertised in newspapers of general circulation in the area where the sale is located (§ 5430.0-6). Usually, at least a two-week lead time for most advertisements is required. Id. The advertisement is commonly referred to as a "Timber Sales Notice" (TSN) and contains the location of the tract, the estimated total quantity of timber recoverable, the unit of measure, the total appraised value, the minimum deposit required, the time and place for receiving bids, the office where additional information may be obtained, and any other facts deemed relevant by BLM at the time (§ 5430.1).

Qualified bidders must submit with their bids a deposit of not less than 10% of the appraised value of the timber offered for sale (§ 5441.1-1). Bidding may be conducted by written bids, oral auction, or a combination of both (§ 5442.1). If by oral auction, the declared high bidder must confirm his oral bid in writing by signing a "Deposit and Bid for Timber" form immediately thereafter. Id. In the case at bar, the evidence discloses that all plaintiff's contracts were awarded on the basis of an oral contract auction, in which a written "Deposit and Bid for Timber" form was executed immediately. See, e.g., Brief Appendix, Defendant's Motion for Summary Judgment (January 18, 1983), at 61.

The contract which actually is executed by the parties is nearly identical to that which is made available to potential bidders at the time of the TSN prospectus. It is entitled "Contract for the Sale of Timber - Lump Sum Sale," and consists of 41 sections and two exhibits. Exhibit A is typically a map of the tract under contract, and Exhibit B is typically a recitation of the estimated quantity of timber recoverable. Exhibit B is

cumulative purchase price of approximately $8.4 million. Also, the 12 contracts were estimated by BLM to produce, in the aggregate, over 53 million net board feet of timber, once all merchantable trees were felled and converted into lumber. Despite BLM's cumulative estimated 53 million board feet (MBF) as reflected in the aggregate in Exhibit B of the 12 contracts, plaintiff alleges that it was able to actually recover only some 74% of this figure (i.e., 39.5 MBF), with a resulting shortfall of approximately 13.9 million board feet. Needless to say, this apparently dramatic shortfall, ranging on individual contracts from 6.84% to 50% (with an average of 26%), is the primary basis averred for the relief sought in this litigation. (See Appendix B, schedule reflecting alleged variances and overpayments.)

Because of the alleged foregoing underruns (i.e., the measured difference between the timber estimated by BLM and the logs scaled by plaintiff), plaintiff first sought administrative relief from its contracting officer, and then appealed the contracting officer's various denials to both the IBLA and the IBCA. Similarly, plaintiff received no comfort on the merits at the board level. As delineated in our analysis of the board proceedings contained in this court's opinion of January 31, 1986, "[w]hat actually happened before these two boards may perhaps be hospitably characterized as utter confusion." Id. at 508. [For a more detailed understanding of the issues which were presented and resolved at the board level, which subsequently surfaced here, the reader is referred to our January 31, 1986 opinion, supra. See also Appendix A attached hereto.]

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based on information previously made available through the TSN. Id. at 65-77.

Thereafter, 12 separate petitions were filed in the predecessor Court of Claims over the period August, 1980 through March, 1981. Jurisdiction was originally premised simultaneously, as to each docket, on both the Tucker Act and the Contract Disputes Act (CDA). This jurisdictional melange was definitively clarified in our January 31, 1986 opinion, supra, after a plethora of motions in both this court and our predecessor court, as follows: Dockets 428-80C, 532-80C, 626-80C, 627-80C, 628-80C, and 637-80C are all properly here pursuant to the CDA, and only the CDA. The remaining docketed claims, 578-80C, 134-81C, 135-81C, 136-81, 137-81C, and 146-81C, do not come within the jurisdictional confines of the CDA and are therefore here pursuant to the Tucker Act, and only the Tucker Act. While we note here the unique jurisdictional basis of each docket seriatim, in a practical sense, because the timber underrun claims are themselves "breach" type claims rather than "arising under claims," the standard of review by this court is nevertheless de novo as to all such docketed claims whether premised under the Tucker Act or the CDA. See Gregory Lumber Co., 9 Cl. Ct. at 520, wherein this dichotomy is analyzed.

In further clarification of the background to all of these cases, there is also one earlier ruling by the predecessor Court of Claims which deserves some comment before we proceed in more detail to the events which have occurred before this court. On January 12, 1982, defendant moved for summary judgment in docket 134-81C. No such similar motion was filed in any of the other 11 docketed cases. At that time, the motion encompassed a request for summary judgment only on the grounds that, notwithstanding the timber shortfalls, the warranty by the plaintiff against reliance on defendant's estimates and defendant's disclaimer

as to quantity bars plaintiff's recovery on its breach of warranty theory. Subsequent to the Court of Claims' eventual ruling on that very January 1982 motion, on June 4, 1982, the amendments to plaintiff's petitions containing the bad faith, misrepresentation, and unconscionability theories were filed on January 12, 1983. In its decision on the January 1982 motion in docket 134-81C, the Court of Claims found that the defendant's numerous disclaimers against warranty of quantity, in conjunction with the plaintiff's own warranty of inspection, effectively precluded plaintiff from recovering on any underruns as a matter of law. Gregory Lumber Co. v. United States, 230 Ct. Cl. 1041, 1043 (June 4, 1982). We are, of course, bound by that decision to the extent it mirrors the operative facts presented in the cases now before this court with regard to the timber underrun issues.

However, that is not the end of the analysis whereas here plaintiff's subsequent amendment to the petition in all of its other 11 docketed cases creates another dimension by raising issues, i.e., bad faith, misrepresentation, and unconscionability, that were not before the court in Gregory, 230 Ct. Cl. 1041, supra. These amendments effectively revived the timber underrun issues in those 11 dockets which most probably would have been dismissed on the basis of the Court of Claims' June 4, 1982 and July 23, 1982 decisions in docket 134-81C. Consequently, this circumstance brings us to the series of remaining unified motions for summary judgment filed by the government in the 11 timber underrun dockets, now pending in this court, seeking a summary disposition of the entire litigation premised on the amended petitions. In that connection, on January 18, 1983, defendant filed a motion for summary judgment in eight docketed cases (428-80C, 626-80C, 627-80C, 628-80C, 637-

80C, 135-81C, 136-81C, and 137-81C) averring its entitlement to recover notwithstanding plaintiff's allegations of bad faith and misrepresentation in making its estimates. On January 24, 1983, defendant filed its motion for summary judgment in dockets 532-80C and 578-80C regarding road construction costs as well as the timber underrun issues as amended. And finally, on February 9, 1983, defendant filed a motion for summary judgment in docket 146-81C regarding road construction costs as well as the timber underrun issues as amended. For reasons previously explained, we address at this time only that portion of the foregoing motions as is related to plaintiff's timber underrun claims.

Since the filing of the foregoing defendant's 1983 motions for summary judgment, much has happened in this complex litigation[7] which bears on the decision which we issue today. For example, there are the circumstances which led to the issuance of our January 31, 1986 opinion, supra. That opinion issued because following the filing of the government's 1983 motions for summary judgment, the plaintiff countermoved for a stay of proceedings and for discovery pursuant to RUSCC 56(f).[8] Plaintiff sought additional discovery in order to gain access to those facts, if any, peculiarly within the knowledge of the defendant which

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7/ Early on in a June 4, 1982 Order, the predecessor Court of Claims characterized these cases as containing a "twisted procedural posture."

8/ RUSCC 56(f) (Feb. 15, 1984 edition) provides: "When Affidavits Are Unavailable. Should it appear from the affidavit of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just." (emphasis added). See Celotex Corp. v. Catrett, supra.

it perceived would enable it to raise genuine issues of material fact in response to defendant's summary judgment motion(s). As found in its January 31, 1986 opinion, supra, this court agreed with plaintiff's position, stayed a decision on defendant's 1983 motions for summary judgment, and granted plaintiff limited discovery ending on April 15, 1986. Following discovery, said opinion ordered the parties to supplement their briefs relative to the defendant's summary judgment motion(s) in order to focus on any new evidence garnered by the plaintiff during its period of discovery.

In an attempt to forestall the RUSCC 56(f) discovery ordered in this court's January 31, 1986 opinion, defendant moved this court, on February 12, 1986, to certify for interlocutory appeal (28 U.S.C. § 1292(d)(2) (1982)) the question of the propriety of this court staying a decision on defendant's motions for summary judgment and allowing plaintiff additional discovery. On February 26, 1986, this court denied defendant's motion for § 1292(d)(2) certification. Thereafter, in a further effort to preclude discovery, the defendant petitioned the U.S. Court of Appeals for the Federal Circuit (CAFC) on March 19, 1986, for a Writ of Mandamus directing this court to deny the plaintiff RUSCC 56(f) discovery and to enter summary judgment in the government's favor on all timber underrun issues. Defendant's petition for such a writ was denied by the CAFC in an unpublished order dated March 31, 1986. Discovery then progressed uninterruptedly until April 15, 1986, after which the parties filed their respective supplements pursuant to the order contained in the court's January 31, 1986 opinion.

III. CONTENTIONS OF THE PARTIES

Although extensively presented in numerous length briefs and supplemental memoranda, the parties' arguments going to the merits of plaintiff's timber underrun claims, as amended, are quite straightforward. Plaintiff's threshold underlying theory to this entire litigation is that the written estimates of recoverable timber volume contained in Exhibit B to each of plaintiff's contracts constituted express warranties by defendant of approximate recoverable timber quantity (more or less, +/- 10%) upon which plaintiff had the unquestioned right to reply, and did so rely, in making its bid and in entering into the 12 subject contracts. Defendant, on the other hand, has consistently and strenuously maintained that no such warranties were intended, none existed, and, in fact, were unequivocally expressly disclaimed in numerous places in each of plaintiff's contracts. In addition, defendant cites to an unconditional express warranty of inspection by which the plaintiff itself definitively warranted to defendant that it was entering into each contract based upon its inspection and its opinion as to the value of the timber sold thereunder. Assuming for the moment that the parties' allegations go no further than the foregoing (although in reality they do), the question is clearly resolved in favor of the defendant as the Court of Claims held back on July 4, 1982, relative to docket 134-81C.

However, where matters become slightly more complex is when one considers the impact on this neatly tailored scenario described supra, in conjunction with plaintiff's subsequently alleged theories of bad faith, misrepresentation, and unconscionability. In order to overcome the preclusive effect of the defendant's disclaimers, and plaintiff's warranty of inspection, plaintiff

now argues that at the time the contracts were entered into with the government, BLM then knew that its volume estimates in Exhibit B to each contract were grossly overstated. To the extent the government acted with said alleged knowledge, intending injury to bidders it well knew would rely on those estimates, plaintiff proclaims such bad faith conduct demands recovery notwithstanding the existence of the broad disclaimer and its warranty of inspection. Additionally, to the extent the evidence is wanting of malice, and reflects mere knowledge or reasonable attribution of said knowledge, plaintiff asserts actionable misrepresentation to overcome the broad disclaimers and the warranty of inspection. Lastly, there is the argument by plaintiff that inasmuch as it is a small business, lacking in any meaningful bargaining power, and thoroughly dependent on the government for its livelihood, the insertion of such broad disclaimers and warranty in the contracts is indeed unconscionable under the circumstances, which renders such disclaimers unenforceable in favor of the prevailing defendant's express warranty of quantity.

The thrust of defendant's response to all of the foregoing has been two-fold. First, defendant argues that even given the facts as alleged by plaintiff relative to bad faith, misrepresentation, and unconscionability, its warranty disclaimers as to estimated recoverable quantity and the warranty of inspection by plaintiff are nonetheless enforceable as a matter of law. This initial position undoubtedly accounts for defendant's unrelenting quest to resolve this litigation by summary disposition without a reasonable opportunity for discovery by plaintiff. Secondly, defendant argues that regardless of these abstract theories, they do not overcome the warranty disclaimers as to quantity and the warranty of inspection, inasmuch as plaintiff has

presented no credible facts to support or even to raise genuine and material fact issues as to the actionable elements of bad faith, misrepresentation, or unconscionability.

While the debate as to the legal merits of defendant's first position could be endlessly waged, we have acted upon what we perceive to be the sounder approach, i.e., to test plaintiff's amended petition and defendant's motions for summary judgment based on the defendant's second contention. In other words, by granting plaintiff's RUSCC 56(f) motion, and allowing it additional discovery, we have put plaintiff to the proof of going forward with the evidence of establishing genuine issues of material fact as required by RUSCC 56(e). Against the foregoing background, we offer a recitation of the specific discovered facts, from plaintiff's perspective, which allegedly overcome RUSCC 56(e)[9] and raise genuine issues of material fact so as to make summary judgment inappropriate. So as to not misconstrue or misstate what plaintiff perceives to amount to facts sufficient to raise triable issues of fact, we quote directly from plaintiff's brief, infra. Plaintiff has asserted four main "[f]indings" as grounds for establishing bad faith and misrepresentation in overcoming its RUSCC 56(e) obligation. These are:

9/ RUSCC 56(e) (Feb. 15, 1984 edition) provides, in pertinent part: "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him." (emphasis added).

(1) BLM reports of large contracts from 1969 through 1977 at Eugene, Oregon reveal that 88.9% were underruns -- knowledge concealed from the public and industry.

(2) BLM explained large underruns by inventing the theory that there were major differences between BLM and industry scaling techniques, which was untrue. BLM then applied the theory on a faulty assumption which was contradicted by data available to BLM from Gregory.

(3) For two decades BLM management was informed of serous gaps between BLM estimates and industry recovery but did nothing to solve the problem.

(a) ineffectual programs were established, e.g., the timber appraisal and cruiser/appraiser programs.

(b) internal BLM standards and practices, e.g., cruising accuracy, were concealed and unavailable.

(4) BLM took unfair advantage of industry by deliberately inserting inequitable clauses in contracts whose acceptance was made a condition of bidding and obtaining timber.

Supplemental Opposition to United States' Motions for Summary Judgment at 6. In the discussion which follows infra, we assess the materiality of these so-called "[f]indings" in terms of plaintiff's RUSCC 56(e) obligation.

IV. DISCUSSION

A. Introduction

We now address the questions presented relative to plaintiff's timber underrun claims by methodically applying the operative provisions that RUSCC 56 outlines for evaluating and resolving motions for summary judgment. That process evolves around two critical determinations. First, pursuant to RUSCC 56(c)[10] relating to the motion and proceedings thereon, the moving party must show affirmatively, based on the pleadings, depositions, answers to interrogatories, admissions and affidavits, if any, that (1) there are no genuine issues as to any material facts; and (2) that it is entitled to judgment as a matter of law. Balboa Insurance Co. v. United States, 775 F.2d 1158 (Fed. Cir. 1985); SRI International v. Matsushita Electric Corp., 775 F.2d 1107 (Fed. Cir. 1985). Second, pursuant to RUSCC 56(e),[11] it must be determined whether the non-moving party has merely rested upon bare allegations or denials, or has set forth any specific facts, by depositions, answers to interrogatories, or affidavits, showing that there are indeed genuine issues of material fact for trial. Balboa, 775 F.2d at 1163. In the case where the moving party makes the proper

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10/ RUSCC 56(c) provides: "Motion and Proceedings Thereon. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

11/ See note 9, supra.

showing pursuant to the standards of RUSCC 56(c), the entry of summary judgment, therefore, will not be withheld based simply on naked allegations or unsupported conclusions of the non-moving party, Celotex Corp., 106 S.Ct. at 2553. That burden "on the moving party may be discharged by `showing' -- that is, pointing out to the . . . Court -- that there is an absence of evidence to support the nonmoving party's case." Id. at 2554. In such case, the non-movant must go forward and identify specific credible facts tending to either establish all necessary elements of its cause of action, or at a minimum, sufficient to raise genuine issues of material fact relative thereto. Id. at 2552-53. Otherwise, Celotex Corp. teaches that:

> the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issues as to nay material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of [its] case with respect to which [it] has the burden of proof.

Id. at 2553 (emphasis added).

We begin our analysis by examining the allegations of the plaintiff and the arguments of the defendant in the

context of the requirements of RUSCC 56. Plaintiff initially relies on a warranty of quantity theory relative to the board feet recoverable under each contract. Defendant has countered with an argument that such warranties, if any, were unequivocally disclaimed. Moreover, defendant further asserts that plaintiff's reliance on any warranty of quantity was equally unjustified based on plaintiff's unconditional express warranty of inspection. The threshold question we much resolve, therefore, is if defendant shows the operative facts to be uncontroverted, i.e., no warranty of quantity was made, is defendant then entitled to judgment as a matter of law on the timber underrun claims. Our next step, should defendant be found to have carried its threshold burden, is to examine any newly discovered evidence proffered by the plaintiff to determine whether there exists triable issues of fact relative to plaintiff's counter-arguments based on bad faith, misrepresentation, and unconscionability. If plaintiff succeeds in posturing issues of fact, then an assessment of the impact of the genuineness and materiality of those issues will be addressed. On the other hand, if plaintiff fails in its burden of going forward under RUSCC 56(e), then judgment shall be entered appropriately in favor of the defendant. Of course, should the defendant fail in its initial burden, our inquiry would likewise be at an end. We next discuss each of these issues seriatim.

B. Defendant's Entitlement

Defendant's summary judgment motion is based almost solely on the language in the contracts themselves, and the favorable precedent in several cases in the predecessor Court of Claims. Inasmuch as the defendant's assertion of the contract disclaimers and the plaintiff's warranty of inspection are in the form of an affirmative

defense to plaintiff's breach of warranty theory, regarding defendant's estimates of board feet of timber, the burden of persuasion with respect thereto rests with the defendant. In this regard, defendant's RUSCC 56(c) burden therefore entails supporting its motion with credible evidence sufficient to entitle it to a directed verdict if not controverted at trial. Celotex, 106 S. Ct at 2553. In addition, defendant, as movant, also possesses the initial burden of persuading the court that, with respect to those issues for which plaintiff would possess the burden at trial (i.e., bad faith, misrepresentation, and unconscionability), plaintiff's evidence is insufficient to establish at least one essential element of each of these alternative causes of action. Id. As discussed infra, we believe the record clearly shows that defendant has fulfilled each of these enumerated burdens.

The strength of defendant's proffer stems from identical language common to each contract, in each of the 11 dockets in which a timber underrun claim exists (i.e., all except 134-81C which issue was previously decided by the predecessor Court of Claims). One expressed contract provision in particular contains the operative language relative to the plaintiff's warranty of inspection and the defendant's disclaimer of any warranty of quantity. That provision, "Sec. 6," provides as follows:

> (a) Purchaser warrants that this contract is accepted and executed on the basis of its examination and inspection of the timber sold under this contract and its opinion of the value thereof.
>
> (b) Government expressly disclaims any warranty of fitness of timber for any purpose; all timber sold hereunder is accepted As Is (in original)

without any warranty of merchantability by Government. Any warranty as to the quantity or quality of the timber sold hereunder is expressly disclaimed by Government.

Defendant's Brief, January 18, 1983, Appendix at 65 (emphasis added). In addition, Exhibit B of each contract, the exhibit which contains the estimated recoverable timber figures upon which plaintiff allegedly relies, is captioned "Lump Sum Sale" and contains the additional express caveat:

Except as provided in Sec. 2, Purchaser shall be liable for total purchase price even though quantity of timber actually cut or removed or designated for taking is less than the estimated volume or quantity shown.

Id. at 77 (emphasis added). The internally referenced "Sec. 2" removes nothing from the plain meaning of this provision.

As an additional, perhaps corrobative, source of evidence as to the absence of a warranty regarding recovery of a specific quantity of timber, defendant has also proferred the bid documents which were assembled and provided to Gregory prior to the time the contracts were in fact signed. The BLM standard bid form entitled "Deposit and Bid for Timber: Lump Sum Sale," applicable in each sale, advises bidders in accordance with paragraph 6(a) of the instructions to Bidders, as follows:

Bids shall specify (1) Bureau of Land Management estimated volume, (2) price per thousand board feet, and (3) total purchase price. Estimated volume and

price per thousand board feet are to be used for administrative and reappraisal purposes only. Upon award of contract, high bidder shall be liable for total purchase price, including any adjustment which may be made as a result of reappraisal if an extension of time is granted, even though quantity of timber actually cut, removed, or designated for taking is more or less than the estimated volume or quantity listed.

Id. at 62 (emphasis added). Similarly, the bid confirmation form which Gregory was required to sign at the time it placed the highest oral bid at the auction is also persuasively probative on the issue. Directly above the signature line for the high bidding company's representative it states:

If timber sale contract is executed, undersigned is liable for total purchase price even though the quantity of timber cut, removed, or designated for taking is more or less than the total estimated volume or quantity shown above.

Id. at 61 (emphasis added).

In assessing the import of the various sources of evidence presented, supra, which defendant has asserted to carry its RUSCC 56(c) burden, we are at once made aware of the fact that the operative provisions of the foregoing contract(s) and bid form(s) are essentially incontrovertible. They manifest the official record of the parties' understanding and agreement as to their corresponding rights and obligations under the contract(s). Inasmuch as

they contain the signatures of both parties, they testify forcefully to the mutual consent of the parties. From this perspective, and noting the fact that plaintiff has presented no evidence or arguments to the contrary, these contract and bid form provisions must be accepted by the court as essentially uncontroverted facts. As such, they reflect the requisite uncontroverted factual predicate for assessing defendant's entitlement to judgment as a matter of law.

Defendant's position on the legal merits of the warranty/disclaimer relationship is, upon considerable reflection and review, the position we are inclined to adopt. Additionally, notwithstanding the plaintiff's counter-allegations of bad faith, misrepresentation, and unconscionability, allegations for which we only look to the plaintiff for affirmative proof of "specific facts," defendant's reliance on the contract disclaimers and plaintiff's warranty of inspection (absent a showing by plaintiff of genuine issues of material facts here) is also fully supported by the binding precedent of the U. S. Court of Claims. See Gregory Lumber Co., 230 Ct. Cl. at 1041; Webco Lumber, Inc. v. United States, 677 F.2d 860 (Ct. Cl. 1982); Caffall Brothers Forest Products, Inc. v. United States, 678 F.2d 1071 (Ct. Cl. 1982).

In particular, the Webco and Gregory cases were based on contracts which contained identical contractual language to that presented here. The same disclaimer of warranty of quantity, the contractor's warranty of inspection, and warnings that the purchaser is liable for the entire purchase price regardless of the quantity of timber recovered, were present there as are present here. Moreover, there, as here, the plaintiffs were all "invited,

urged and cautioned," to inspect the timber prior to submitting a bid. On these facts, the Court of Claims stated conclusively in the prior Gregory case.

> A contractor cannot, as plaintiff did, sign a contract which states, ["][p]urchaser warrants that this contract is accepted and executed on the basis of its examination and inspection of the timber sold under the contract and its opinion of the value thereof,["] in 1975, and then in 1982 come into this court, make the bare allegation that it had insufficient time to inspect the timber, and expect the court to override the contractual terms. Plaintiff cannot recover as a matter of law.

Gregory, 230 Ct. Cl. at 1043. As we have previously stated, unless plaintiff is able to come forward with "specific facts" supporting the allegations of bad faith, misrepresentation, and unconscionability, which we believe on the present record it cannot and has not, cases such as the prior Gregory decision, and the Webco case cited therein, bind us to award summary judgment to the defendant on the warranty/disclaimer issues regarding the timber underruns.

In relying on the prior Gregory decision, and that in the Webco case, it must not be overlooked that neither those decision, nor this opinion, rest upon the blanket conclusion so often asserted by the defendant in this litigation that regardless of the facts -- i.e., the degree or circumstances of any bad faith, misrepresentation, or unconscionability -- the contract disclaimers and plaintiff's warranty of inspection nonetheless entitle defendant to judgment as a matter of law. We do not read the case law of this court and our

predecessor court to support such a holding. Rather, as we explain in more detail, infra, the need to consider such a hypothesis, on the merits, does not arise in this litigation, and it did not arise in the prior Gregory decision, or the Webco case. But rather, because of the total absence in this case of specific material facts sufficient to even raise such issues as bad faith, misrepresentation, or unconscionability beyond the category of mere allegations, they did not form a part of the factual predicate upon which our decision turns, infra.

C. Plaintiff's Burden Relative To The Existence Of Genuine Issues Of Material Fact (RUSCC 56(e)) And Defendant's Burden As To The Non-Existence And Non-Materiality Of Any Such Issues (RUSCC 56(c))

1. Bad Faith

Plaintiff seeks to posture a genuine issue of material fact and defeat defendant's motion for summary judgment, as to each petition, by averring that the substantial underruns (excess of BLM's estimate of board feet of timber over actual recovery) in each contract are the products of defendant's bad faith. As a basic proposition, findings that public officials have acted with an intent sufficient to constitute bad faith are relatively few. This is not surprising, however, because of the long-accepted presumption that public officials act in good faith, and with integrity in the performance of their duties. Contract Custom Drapery Service v. United States, 6 Cl. Ct. 811, 817 (1984); Eagle Constr. Corp. v. United States, 4 Cl. Ct. 470, 479 (1984); P. Francini & Co. v. United States, 2 Cl. Ct. 7, 11 (1983); Burroughs Corp. v. United States, 617 F.2d 590, 597 (Ct. Cl. 1980); Sun Oil Co. v. United States, 572 F.2d 786 (Ct. Cl.

1978). As a corollary thereto, the level of proof required to overcome said presumption has been described as "well-nigh irrefragable," and will not be sustained by inferences or speculation. Contract Custom Drapery Service, 6 Cl. Ct. at 817; CACI, Inc. v. United States, 719 F.2d 1567 (Fed. Cir. 1983); American General Leasing v. United States, 587 F.2d 54, 59 (Ct. Cl. 1978); Knotts v. United States, 121 F. Supp. 630, 631 (Ct. Cl. 1954). As defendant in its brief points out, "[p]laintiff must present 'irrefragable proof' such as a 'conspiracy to get rid of the plaintiff,' or that the actions of the defendant were 'motivated alone by malice,' or were 'designedly oppressive.'" Defendant's Supplemental Response at 13, citing Knotts, 121 F. Supp. at 130; Gadsen v. United States, 111 Ct. Cl. 487 (1948); Struck Construction Co. v. United States, 96 Ct. Cl. 186 (1942).

In order to sustain this heavy burden enumerated supra, plaintiff relies on its contention that defendant concealed from the public and industry the existence of underruns, some of large magnitude, in an average of 88.8% of those contracts (unrelated to plaintiff) let by BLM as evidence establishing "specific facts" of bad faith as to the plaintiff. There is no showing whatsoever that in any of those contracts plaintiff at bar was a party. Moreover, the underrun issue was a perceived industry problem as to which, the record shows, it had general knowledge for many years pre-dating the contracts in issue. Plaintiff goes on to allege that defendant's explanation for said underruns is "untrue"; and finally blandly concludes that BLM has done "nothing" to correct this problem. We find such contentions to be totally inadequate to raise even an inference of bad faith as against plaintiff. The allegations proffered here are fatally defective in that they simply generally relate to unnamed third parties.

More importantly, they fail to posture "specific facts" clearly establishing genuine and material issues for trial, as required.

As has been held by the U. S. Supreme Court, as well as this court, bad faith, which is a form of fraud, "implies intentional conduct . . . ." LaMear v. United States, 9 Cl. Ct. 562, 570, aff'd unpublished slip op. (Fed. Cir. November 17, 1986), citing Wood v. Carpenter, 101 U.S. 135, 143 (1879). See also Hohri v. United States, 782 F.2d 227, 261 (D.C. Cir. 1986) (Markey, C.J., dissenting). "Concealment by mere silence is not enough. There must be some trick or contrivance intended to exclude suspicion and prevent inquiry." Wood, 101 U.S. at 143. Nowhere does the "evidence" proffered by the plaintiff suggest that the defendant attempted to secrete the evidence of past underruns regarding unrelated contractors. In point of fact, the source from which the government information as to the actual recovery and alleged underruns of timber on BLM contracts, which is the precise information which plaintiff now contends was concealed from industry, is a form filled out by contractors such as Gregory Lumber. It has never been suggested that these forms were not themselves public documents, available upon request, should plaintiff or any other contractor wish to compare them with BLM's contract estimates. Not to mention the fact that BLM contract files themselves are themselves public documents. If this was such important information, as plaintiff now contends, it is puzzling why plaintiff did not seek it prior to committing its resources to perform, not one but 12, high volume timber sale contracts. We are confident that had plaintiff sought such information, it would have been provided.

Not only is there not one scintilla of evidence of concealment or bad faith proferred by plaintiff (and we have thoroughly searched), to the contrary, the evidence is abundantly clear that industry as a whole was painfully aware of timber underruns in BLM's lump sum sales, and had been so informed and continuously aware thereof since at least 1967, if not sooner. The most probative document evidencing this circumstance is Exhibit 24 to plaintiff's supplemental submission. That exhibit is an official report prepared by BLM which discusses the timber underrun problem in the industry as early as April, 1967. We believe that the extent of the broad exposure within industry of the underrun problem is adequately ventilated by quoting several passages from this 1967 report. The first sentence in the introduction to this report focuses directly on that which plaintiff alleges was concealed from it in 1975 and 1976 at the time the contract in issue were executed:

> One of the problems that members of industry discussed with Director Rasmussen at a December 1966 meeting held in Portland, Oregon, concerned the question of underruns on BLM timber sales. The Director, at that time, promised industry that he would look into the matter.

Plaintiff's Supplement, Appendix, Exhibit 24 at 1513 (Volume IV) (emphasis added). The first subject addressed by this report is entitled: "Differences Between Cruise Volume and the Operators Reported Scale," and contains a general recognition of the precise "knowledge," in the form of a statement of industry, that plaintiff alleges herein that BLM concealed:

> The . . . 16 purchasers claimed that although the cruises varied from the scale in different degrees, the scaled volume tended to underrun the cruise, i.e., they did not cutout the cruised volume.

Id. at 1515. Without quoting endlessly therefrom, we find that the apparent substance of this report represents an obvious cooperative effort by industry and BLM to identify the sources which cause timber cutout underruns, and to propose and test methods designed to alleviate them. Plaintiff is an experienced timber operator, as is attested to by the affidavits of its officers. We simply cannot believe that such a widespread industry concern, addressed publicly by BLM, could have escaped their attention. Even assuming arguendo that it did, if affords no credibility to plaintiff's naked allegations of bad faith and concealment. Such an allegation, in the face of the evidence presented by plaintiff, clearly borders on the frivolous.

2. Misrepresentation

Next, we address plaintiff's contention that the BLM volume estimate of board feet contained within the sales areas, because they were substantially less than timber actually recovered, constituted a misrepresentation. One of the central elements of the doctrine of misrepresentation is that the injured party's reliance upon the statement must have been innocent or reasonable. See Summit Timber Co. v. United States, 677 F.2d 852 (Ct. Cl. 1982). In the context of government contracting, such a standard is measured from the perspective of what the reasonable contractor would have done when charged with knowledge common within the industry. Virginia Engineering Co., Inc. v. United States, 101

Ct. Cl. 516, 532 (1944); Meyerstein, Inc. v. United States, 137 F. Supp. 427, 431 (Ct. Cl. 1956). In general, the test of reasonableness focuses on whether through such knowledge, or through some affirmative signal from the government, the contractor was on notice not to reply on the utterance in issue, or that all such statements should be investigated for the reasons given. H. N. Bailey & Associates v. United States, 449 F.2d 376, 386 (C. Cl. 1971); Rixon Electronics, Inc. v. United States, 536 F.2d 1345, 1349-50 (Ct. Cl. 1976). Failure to heed such warnings leaves any risk created by the alleged misrepresentation with the contractor, and renders a contractor unable to recover under a theory of misrepresentation.

We think that the indisputable evidence in the record more than amply demonstrates that, as a matter of law, the plaintiff in no way behaved reasonably in relying, as it did, on the estimates of recoverable timber contained in Appendix B to each of the contracts in issue. Several indisputable facts lead us to this conclusion. First, there is the long-standing industry knowledge of what were apparently consistent underruns in BLM timber contracts dating back to at least 1966. See Plaintiff's Appendix, Exhibit 24, as discussed supra. That knowledge is clearly attributable to plaintiff who did not enter into the first of these contracts until 1975. Virginia Engineering, 101 Ct. Cl. at 516. While plaintiff, in its averments, supra, makes much of the fact that defendant's explanation for these underruns is "untrue," it is the notice value of these underruns -- that they are indeed occurring -- which is critical, not why BLM allegedly took no action to correct them.

Second, there is the express disclaimer of any warranty against quantity contained in each contract. See Section 6. Defendant, in language too clear to be hailed as ambiguous, is in effect telling plaintiff that it takes no responsibility for what is recoverable within the boundaries of plaintiff's sales area. This warning is even more blatantly expressed where plaintiff is admonished in Exhibit B itself that it is liable for the entire purchase price regardless of the quantity of timber recovered.

Lastly, there is the admonition for plaintiff to conduct its own inspection. In no uncertain terms, plaintiff is warned, in writing, to beware of the need to determine for itself what it is bidding on. Indeed, ab initio, plaintiff was alerted to the principle caveat emptor. We believe that to claim reasonable reliance on the estimated quantity figures in Exhibit B, in light of the foregoing considerations, could in no way be characterized as reasonable. Again, the verity of defendant's explanation or its diligence in correcting these alleged underruns does not impact favorably upon plaintiff's right to rely on the estimates in Exhibit B. In light of the foregoing, therefore, plaintiff has proffered no basis for recovery on the grounds of misrepresentation. Equally important, the simple fact is that there is not one shred of evidence proffered by plaintiff establishing "specific facts" to support a contention that genuine and material issues have been raised regarding the foregoing. Said theory of recovery, therefore, is no more than meritless allegations.

3. Unconscionability

With respect to this issue, the question is whether on these facts it would be unconscionable for this court to give

credence to defendant's disclaimers against quantity and to plaintiff's warranty against reliance on BLM's estimate. In our opinion of January 31, 1986, supra, we noted that the doctrine of unconscionability has had little substantive development in either this court or our predecessor court. In fact, the only informative reference we find is one in the case of Hume v. United States, 21 Ct. Cl. 328 (1886), aff'd, 132 U.S. 406 (1889), wherein an unconscionable contract was defined as one "'which no man in his senses, not under delusion, would make, on the one hand, and which no fair and honest man would accept on the other. . . .'" Hume, 21 Ct. Cl. at 330, quoting Bouvier's Law Dictionary. Updating these notions with the Uniform Commercial Code's definition of unconscionability, as does plaintiff, is complicated in the context of government contracting, at best. In particular, the more modern concept of unconscionability, which stresses inequality of bargaining power, particularly in consumer transactions, is quite dissimilar to the realities of dealing with the federal government as one's contracting partner. It should come as no surprise to find, therefore, that there is no case in either this court or our predecessor court, where a plaintiff has prevailed by invoking the theory of unconscionability to void a perceived unfavorable contract or contract provision. Nor has plaintiff cited us to any.

Despite our reservations about the scope of the doctrine of unconscionability in government contracting, it is a doctrine for which binding precedent nevertheless appears to discern some role in this court. See, e.g., Frass Surgical Mfg. Co., Inc. v. United States, 571 F.2d 34 (Ct. Cl. 1978); Louisiana-Pacific Corp. v. United States, 656 F.2d 650 (Ct. Cl. 1981); Peters v. United States, 694 F.2d 687 (Fed. Cir.

1982). In the Frass case, the court gave limited credence to a claim of unconscionability, but eventually denied it explaining:

> The grant of discretion to deny enforcement to an unconscionable clause in the modern Uniform Commercial Code's Section 2-302 is not intended to permit courts to redistribute risks allocated by differences in bargaining power, but rather to prevent oppression and unfair surprise.

(emphasis added). Frass, 571 F.2d at 40. Analogous to the Frass Court's emphasis on surprise and oppression, is the somewhat later explanation of the court in Louisiana-Pacific, wherein it stated that:

> The doctrine [unconscionability] has been applied in situations where one party signed an unreasonable contract with little knowledge of its terms, from which it could be inferred there was no consent.

Louisiana-Pacific, 656 F.2d at 655 (emphasis added). In Louisiana-Pacific, the inherent unconscionability, however, seems to stem more from the standard concept of lack of consent. In analyzing the contention of unconscionability raised by the plaintiff in the case at bar, we therefore are guided by the foregoing case law to look for all three of these factors -- oppression, unfair surprise, and lack of consent -- but we are to apply them in such a way so as to not disturb any knowing allocation of risk between the parties, no matter how seemingly unfair it might appear on the surface.

Despite plaintiff's protestations that the implementation of the contract disclaimers and the warranty of inspection provisions, given the alleged substantial timber shortfalls, will visit inequity and unfairness on it -- this court is thoroughly convinced that the record belies any such fact. First, there could have been no surprise whatsoever on the part of a reasonable timber operator as to the substance of the bargain struck in the contracts at issue, i.e., their "lump sum" nature, and the fact that the purchaser would be unconditionally liable for the entire purchase price regardless of the quantum of actual recovery. Several clauses and appended provisions, cited supra, make abundantly clear, i.e., beyond cavil, the fact that the government wished to put plaintiff/contractor on notice that it, not the government, was assuming any and all risk as to what was precisely being sold under these contracts. The disclaimer language contained in plaintiff's contracts has been held by our predecessor Court of Claims, in both the prior Gregory and Webco cases, to be fully actionable. Equally significant, on the issue of the existence of "unfair surprise," is the fact that plaintiff's officers were admittedly highly experienced timber operators and businessmen -- hardly the type to enter into multi-million dollar contracts without appreciating and evaluating the basic fundamental risks in the "lump sum" nature of each sale.

Second, the contract disclaimers and warranty of inspection are by no means oppressive. What they required, in order to avoid the type of problems encountered by the plaintiff here, was very little, given the magnitude of each contract undertaken. These provisions not only informed but urged the plaintiff to go out and make its own estimate of the timber on which it was bidding; but they also urged plaintiff

to ensure itself that the minimum price, and its own bid, would indeed be recoverable. All plaintiff seems to argue is that it chose not to perform a pre-bid cruise because it would be a wasteful and costly duplication of the cruise already performed by BLM. That this decision not to make its own pre-bid cruise later turned out to be injurious to plaintiff certainly is not the fault of the defendant. In that connection, it was a knowing and conscious decision by plaintiff, after warning by defendant, and to that extent it assumed the risk. More importantly, plaintiff presents no evidence to show that at any time prior to contracting it voiced any concern as to its inability to adequately protect itself through a pre-bid cruise.

While the outcome of plaintiff's decision to proceed as it did has indeed been costly, assuming of course that the amount of the alleged shortfall in each contract is accurate, there is nothing unfair or unconscionable about what took place under the terms of any of these contracts. Here knowledgeable parties, in a competitive and commercial setting, simply agreed to allocate certain risks in an all and as-is fashion. Plaintiff, not through ignorance or lack of consent, but through conscious competitive decision-making, failed to take into account all information readily available to it, and urged on it to consider, in factoring the risks into its bids. To undue such a bargain, against this background, without a further clear showing of oppression or surprise would be to do precisely what the court in Frass warned against, i.e., applying the doctrine of unconscionability to redistribute risks previously allocated knowingly, freely, and by the conscious mutual decision of the parties.

Much is made of the degree of bargaining power of the plaintiff relative to the BLM, the plaintiff's dependence on government timber for its livelihood, and the plaintiff's lack of meaningful choice regarding the inclusion of the disclaimer provisions in its timber sales contracts, as facts in issue portraying unconscionability. Our response to the foregoing is simply that their materiality is muted by their obvious lack of connection to the primary cause of plaintiff's plight. That is, these factors do not overcome plaintiff's warranty of inspection and plaintiff's certification that its contract bid was based on its own opinion as to the quantity, quality, and value of the timber recoverable. Such provisions were neither hidden nor are they oppressive. We conclude, therefore, that there is not one scintilla of credible evidence in the record to even raise a question as to the unconscionability of any challenged provision of these contracts beyond the level of mere allegation. Thus, we see no "specific facts" in the records raising genuine issues for trial as required by RUSCC 56(e).

4. Docket 428-80C: Negligent Marking of Trees

As we determined supra, the contract underlying the claim in docket 428-80C (Dunn Ridge sale) is not a "lump sum" contract as are the other 11 contracts. Rather, said contract represents a salvage sale of specifically identified trees (i.e., marked with blue paint) -- and not a sale of trees identified solely by geographical location as in the other 11 contracts. Because of the distinction, a somewhat different analysis is required.

The thrust of plaintiff's argument in the Dunn Ridge sale centers on the alleged fact that it was specifically

promised 72 more trees in its contract than were actually marked for cutting in the tract. Plaintiff claims it is entitled to recover the value of these 72 trees in spite of defendant's disclaimer of warranty as to quantity and plaintiff's warranty of inspection, because defendant has admitted in answers to interrogatories that it "inadequately marked or inadvertently failed to mark" said 72 trees. Outside of its reliance on the defendant's alleged admission of liability, plaintiff fails to address in more substance the impact of the defendant's assertion of the disclaimer of warranty of quantity and its (plaintiff's) warranty of inspection on its negligence theory.

We first address defendant's alleged admission of liability. Although plaintiff asserts that defendant admits liability for the shortfall in docket 428-80C in answers to interrogatories, the real basis for that alleged admission is contained in a letter dated August 14, 1979, from the BLM to plaintiff via its counsel. While arguably containing a tacit admission of liability,[12] we believe that that letter is nonetheless not available to plaintiff as a basis on which to premise a contention that defendant has unequivocally admitted liability. This is so because the nature of that August 14, 1979 letter, in our judgment, is such that it falls clearly within the evidentiary prohibition of Federal Rule of Evidence (FRE) 408 dealing with "Compromise and Offers to Compromise."[13] The August 14, 1979 letter is a response

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12/ The operative language in said letter is that -- "the [BLM] . . . is prepared to refund $45,055.04 to Gregory Lumber Company, Inc., in full settlement of any claims which the company feel [sic] it has in connection with the Dunn Ridge timber sale contract. . . ." (emphasis added).

13/ FRE 408 provides, in pertinent part, as follows: "Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or

to a claim submitted on behalf of the plaintiff to the BLM for a contract modification and refund based on the alleged shortfall in docket 428-80C. The BLM's response outlines that it is willing to offer plaintiff a "settlement" amount in exchange for a release by plaintiff of all claims arising out of the contract in docket 428-80C. Any document prepared in such a context, and containing such language, would be clearly inadmissible at trial, and thus cannot serve as the sole and definitive factual predicate for plaintiff's assertion that defendant has admitted liability. As a result, we do not find in the record any support for the contention that defendant has in any way legally admitted liability for any alleged negligent marking of trees in docket 428-80C. More significantly, plaintiff does not point us to any such evidence.

This is not to say that in plaintiff's plethora of submitted supplemental material there is not some evidence to raise an issue of fact as to whether defendant acted negligently in failing to mark certain trees appropriated to the contract in docket 428-80C. We believe the various analyses performed by plaintiff's outside expert, contained in Appendix Exhibit 21 (affidavit of James Prochnau, and submitted reports numbered 1 and 5) clearly raise as an issue of fact the proper explanation as to why there was a shortfall of specifically-identified trees in docket 428-80C. While there may remain questions of fact on the issue of negligence in this regard, however, whereas here there is no evidence of bad faith or misrepresentation, they are immaterial, as a matter of law, and are regrettably insufficient to overcome

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attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible."

the plaintiff's burden pursuant to RUSCC 56(e) and the preclusive effect of plaintiff's unequivocal contractual warranty of inspection.

In granting the defendant summary judgment in docket 428-80C as well, we rely primarily on the plaintiff's contractual warranty of inspection, rather than on the defendant's express disclaimer of warranty. Plaintiff seeks compensation here under docket 428-80C because certain specifically identified standing trees were not marked and felled. It is not a claim which rests expressly on the failure to obtain an estimated volume of recoverable board feet of cut timber. Therefore, we believe that inasmuch as there is created herein some reasonable ambiguity as to whether the disclaimer of warranty of quantity applies to such a characteristically non-lump sum transaction, we decline to rest our decision on the basis of said disclaimer provision.

Where there is no ambiguity, and plaintiff has asserted none, is in the impact of plaintiff's warranty of inspection. Plaintiff warranted that it signed and accepted the contract in docket 428-80C on the basis of its own inspection and estimate of the timber on the tract. Against that background, plaintiff either failed to inspect and examine the trees as specifically warranted, or it did so negligently. In other words, plaintiff was the person in a position to prevent such a situation from occurring by undertaking a reasonably accurate inspection. Apparently it failed to do so for reasons it deemed to be appropriate. We fail to see how plaintiff could have properly conducted said inspection and still have failed to notice the allegedly missing 72 trees. If the trees were identifiable as missing after cutout, they were certainly similarly identifiable as missing

before the cutout as well inasmuch as they would not have been marked. This is what plaintiff itself warranted, i.e., it inspected the area and observed the precise number of trees marked for cutting as stipulated in the contract, and by so doing, assumed the risk for any discrepancy which, in this case, obviously should have caused it to complain before the contract was signed, instead of after. This intervening fact of plaintiff's warranty of inspection breaks the causal link between any perceived negligence on behalf of the government in failing to mark said trees, and the resulting loss to plaintiff who entered into said contract warranting it had undertaken actions which would have discovered said preceding negligence on behalf of the government. The question as to the degree and nature of the defendant's negligence, therefore, is immaterial and cannot be asserted as a basis to overcome plaintiff's RUSCC 56(e) burden and deny defendant judgment as a matter of law.

V. CONCLUSION

As noted supra, this opinion addresses only the timber underrun claims contained in plaintiff's amended petitions. Our award of summary judgment and partial summary judgment to the defendant pursuant to its 1983 unified motions for summary judgment is as follows:

(1) Complete Summary Judgment is awarded to the defendant per dockets 428-80C, 578-80C, 626-80C, 627-80C, 628-80C, 637-80C, 135-81C, 136-81C and 137-81C. The Clerk shall enter judgment for the defendant therein and said petitions and amended petitions shall be dismissed. Costs to the prevailing party.

(2) Partial Summary Judgment is awarded to the defendant per dockets 532-80C, and 146-81C. Said partial summary judgment relates to all claims in said petitions and amended petitions which state claims based on the alleged timber underruns (i.e., warranty, bad faith, misrepresentation, and unconscionability).

(3) On the basis of the foregoing, remaining before the court in this litigation are warranty of rock source claims in dockets 532-80C and 146-81C, and a remanded road usage costs claim and defendant's counterclaim in docket 134-81C.[14]

Lastly, the parties shall appear before the court for a hearing at 10:00 a.m., on January 20, 1987, to determine the status and mode of resolving those claims remaining as delineated supra.

IT IS SO ORDERED.

14/ While it is true that the petitions in dockets 532-80C and 146-81C alleged subsidiary claims based on a recovery of costs for an alleged road design change, said claims were dismissed, without prejudice, for lack of jurisdiction in our decision of January 31, 1986. Nothing we do here today changes that result, or prejudices plaintiff relative to the future initiation of any claim relative to those road design changes properly within our jurisdiction in the future.

Supreme Court, U.S.
FILED
FEB 10 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-865

In the Supreme Court of the United States

OCTOBER TERM, 1987

GREGORY LUMBER COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner assumed the risk that the amount of timber that it harvested under contracts with the government would be less than the government's estimate.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A2) is reported at 831 F.2d 305 (Table). The opinion of the United States Claims Court (Pet. App. A4-A45) is reported at 11 Cl. Ct. 489.

JURISDICTION

The judgment of the court of appeals was entered on September 1, 1987. The petition for a writ of certiorari was filed on November 27, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was the successful bidder at auctions for the sale of standing timber on 12 tracts in National Forest lands near Eugene, Oregon. As the result of being the suc-

cessful bidder, petitioner entered into 12 separate contracts with the Bureau of Land Management (BLM) for the purchase of uncut timber. The cumulative price was approximately $8.4 million. Pet. App. A9-A12.

Prior to the bidding, BLM gave petitioner documents that included estimates of the amount of timber. These documents stated that the estimates were made solely as an administrative aid for determining bonding requirements and the timing of payments. The standard BLM bid form given to petitioner stated as follows (Pet. App. A26):

> If timber sale contract is executed, undersigned is liable for total purchase price even though the quantity of timber cut, removed, or designated for taking is more or less than the total estimated volume or quantity shown above.

The executed contracts reconfirmed that petitioner was liable for the full price even if the actual quantity of timber was less than the estimates. Exhibit B of each contract stated (Pet. App. A25 (emphasis omitted)) that "[p]urchaser shall be liable for total purchase price even though quantity of timber actually cut or removed or designated for taking is less than the estimated volume." And section 6 of each contract provided as follows (*id.* at A24-A25 (emphasis omitted)):

> (a) Purchaser warrants that this contract is accepted and executed on the basis of its [purchaser's] examination and inspection of the timber sold under this contract and its opinion of the value thereof.
>
> (b) Government expressly disclaims any warranty of fitness of timber for any purpose; all timber sold hereunder is accepted *As Is* (in original) without any warranty of merchantability by Government. Any warranty as to the quantity or quality of the timber

sold hereunder is expressly disclaimed by Government.

Petitioner alleges that the amount of timber harvested under the 12 contracts was 26% less than the aggregate estimated amount. Petitioner filed 12 cases in the Court of Claims to recover the difference in value between the estimated and actual harvests.

2. In one of the 12 cases, the Court of Claims granted the government's motion for summary judgment; it held that, under the contracts, petitioner bore the risk that the estimates were high. See 230 Ct. Cl. 1041 (1982). The court based its holding on the lack of any government warranty of quantity and petitioner's statement in the contracts that its purchase was based upon its own examination of the timber.

Petitioner then amended its claims in the remaining eleven cases to add allegations of bad faith, misrepresentation and unconscionability (Pet. App. A14). The Claims Court, successor to the Court of Claims, permitted extensive discovery on petitioner's new allegations. After an exhaustive review of the record, the Claims Court granted the government's motion for summary judgment in nine of the 11 cases. *Id.* at A44.[1] The court held that there was "the total absence in this case of specific material facts sufficient to even raise such issues as bad faith, misrepresentation, or unconscionability beyond the category of mere allegations" (*id.* at A29). The court of appeals affirmed in a per curiam order adopting the Claims Court's opinion (*id.* at A1-A2).

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[1] The court granted partial summary judgment in the two remaining cases, which involved issues that are not relevant to the petition.

ARGUMENT

The lower courts' interpretation of the contracts and review of the factual record are correct. Moreover, the decision below conflicts with no relevant federal authority. Accordingly, no further review is warranted.

1. Petitioner first contends (Pet. 5-15) that the government warranted the quantity of timber and that the contracts' disclaimer of warranties is ineffective. This argument ignores the plain language of the contracts. It is well settled under the law of federal contracts that "[w]here the language of a contract is clear and unambiguous on its face, a court will assume that the meaning ordinarily ascribed to those words reflects the intention of the parties." *NRM Corp.* v. *Hercules Inc.*, 758 F.2d 676, 681 (D.C. Cir. 1985). Here, the contracts between petitioner and the government state that petitioner "shall be liable for the total purchase price even though quantity of timber actually cut * * * is less than the estimated volume" (Pet. App. A25 (emphasis omitted)). And plaintiff warranted that it entered into the contracts based on its own "inspection of the timber * * * and its opinion of the value thereof" (*id.* at A24 (emphasis omitted)). Hence, the contracts unambiguously reveal that the parties placed the risk on petitioner that the amount of timber harvested would be less than the estimated quantities.[2]

---

[2] The timber industry was well aware of this risk allocation. In negotiations leading up to the standard contract, the timber industry attempted to obtain a warranty that the estimates would be at least 90% accurate. The government declined to make such a warranty. See *Cafall Bros. Forest Products, Inc.* v. *United States*, 678 F.2d 1071, 1077 (Ct. Cl.), cert. denied, 459 U.S. 908 (1982). Thus the "industry practice [is] plainly not to interpret Forest Service estimates of timber volumes as guarantees" (*ibid.*). In addition, the Claims Court found that the timber industry knows that estimates in BLM contracts have frequently been high since 1966.

Contrary to petitioner's claim (Pet. 12), the contracts do not have inconsistent clauses. They do not purport to disclaim warranties regarding the quantity of timber that are expressed elsewhere in the contract. The government simply made no such express warranties in the first place. Thus the court of appeals' decision is consistent with opinions (see *id.* at 12-15) holding that a general disclaimer of warranties does not alter a seller's express warranties.

Nor does the decision conflict with the line of decisions (see Pet. 7) holding that a party bidding on a government services contract may reasonably rely on the government's specifications. In *United States* v. *Atlantic Dredging Co.*, 253 U.S. 1 (1920), the principal case relied on by petitioner, the government misrepresented the nature of the material to be dredged pursuant to a contract. In that case, there was "a clear declaration of the belief of the Government that its representation was true" (*id.* at 10). Under those circumstances, the Court held that the government assumed the risk of additional costs if its representation regarding the dredging was inaccurate. The government received the benefits of the work and thus fairness dictated that the Government pay for the work (*id.* at 12).

In this case, by contrast, the government never purported to make any representation of the precise amount of timber that could be harvested. The government provided only estimates and petitioner expressly assumed the risk that the estimates were high. Thus the line of cases represented by *Atlantic Dredging Co.* did not require the court of appeals to ignore the plain intent of the parties in this case.

2. Petitioner next contends (Pet. 15-18) that the court of appeals misinterpreted the terms "more or less" and "approximately" that appeared in documents given to peti-

tioner prior to the bidding.[3] Petitioner, however, never identifies the contractual clauses that it claims were misinterpreted so that the terms may be placed in context and their meaning derived. Nor does petitioner specify where in the court's opinion the misinterpretation occurred.

Petitioner may be referring to the language in the BLM standard bid form that the successful bidder "is liable for total purchase price even though the quantity of timber cut * * * is *more or less* than the total estimated volume" (Pet. App. A26 (emphasis added)). The words "more or less" in this context do not mean "approximately." Rather, this clause plainly means that the purchaser must pay the full price whether the harvested amount is more than the estimated volume or less than the estimated volume (*i.e.*, regardless of the actual harvest).

3. Petitioner also argues that the court of appeals erred in not adopting the Uniform Commercial Code as the law to be applied in this case. It is well settled, however, that federal common law governs contracts with the United States for the sale of goods. See *Priebe & Sons, Inc.* v. *United States,* 332 U.S. 407, 411 (1947). In developing this body of federal law, courts often seek guidance from the Uniform Commercial Code. In this case, for example, the Claims Court considered (Pet. App. A37) the Uniform Commercial Code's section on unconscionability. But the Claims Court and the court of appeals were not required to view their role as simply interpreting the Uniform Commercial Code.

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[3] Petitioner's reliance on *Brawley* v. *United States,* 96 U.S. 168 (1878), for this argument is misplaced. The Court noted in *Brawley* that terms such as "about" are "not regarded as in the nature of a warranty, but only as an estimate of the probable amount" (*id.* at 171).

4. Finally, petitioner contends that the courts below erred in holding that the government acted in good faith and that the contracts were not unconscionable. Both of these contentions are meritless.

Contrary to petitioner's assertion (Pet. 25), the Claims Court did recognize that contracting parties have an obligation to act in good faith. See Pet. App. A29-A31. The court simply held that petitioner submitted no evidence that the government breached such an obligation in this case. As the Claims Court noted, there is "*not one scintilla* of evidence of concealment or bad faith proffered by" petitioner (*id.* at A32 (emphasis in original)). Petitioner points to nothing in the record indicating that the Claims Court's review of the record was wrong.

Nor does petitioner refer to any evidence to support its claim that the contracts were so unfair as to be unconscionable. The Claims Court aptly observed that "knowledgeable parties, in a competitive and commercial setting, simply agreed to allocate certain risks" (Pet. App. A39). The lower courts properly respected the risk-allocation bargain that was entered into "knowingly, freely, and by the conscious mutual decision of the parties" (*ibid.*).

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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FEBRUARY 1988

U.S. GOVERNMENT PRINTING OFFICE: 1988—202-037/60278

Supreme Court, U.S.
FILED
FEB 17 1988
JOSEPH F. SPANIOL, JR.
CLERK

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The United States Court of Appeals
For the Federal Circuit

REPLY BRIEF OF PETITIONER

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No. 87-865

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1987

GREGORY LUMBER CO.,

Petitioner,

v.

UNITED STATES

Respondent.

On Petition for Writ of Certiorari to
The United States Court of Appeals
For the Federal Circuit

REPLY BRIEF OF PETITIONER

SUMMARY

Gregory Lumber Co.'s Petition for a Writ of Certiorari traced the development of the law of contracts as it applies both to federal contracts and the stream of commerce in general. Gregory demonstrated that conflicts exist between the holdings of the Federal Circuit, this Court, other federal circuits and the courts of the various states on three significant issues governing these 12 government contracts. The United States did not address these conflicts in its Opposition.

In its Petition Gregory presented three issues for consideration by this Court. The first issue is whether the United States can disclaim its estimates of quantity while simultaneously demanding minimum bid prices at auctions with reserve. The second issue is whether the terms "more or less" and "approximately" as interpreted by this Court permit shortages in quantity as high as 50% in United States contracts. The third issue is whether the Uniform Commercial Code should be applied as a unified body of law to a contract drafted by the United States government.

The Claims Court granted the motions for summary judgment made by the United States. Gregory never received the benefit of a hearing on the evidence or a trial. The decision in this case and the precedents upon which the Claims Court relied may very well constitute the precedents for hundreds of disputes arising under the Contract Disputes Act of 1978, 41 U.S.C. § 601 et seq. This area of federal contract law urgently needs clarification.

I. THE QUESTION OF "ASSUMPTION OF RISK"

The only issue framed by the United States in its opposing Brief repeats a comment of the Claims Court, which itself misconstrued the issue in this controversy by describing warranty disclaimers as an affirmative defense. "Assumption of risk" is a tort concept and an attempt by the United States to transform a tortious breach of contract into inappropriate legal theories of contributory negligence and assumption of risk. The United States offered no reasoning or decisions to support its theory of "assumption of risk".

II. COMMENTS ON THE "STATEMENT" OF THE UNITED STATES

The United States chose to argue the merits of the case in its Brief. It did so by selecting only certain facts from the complicated history of these cases for its arguments. The United States' choice of facts invites Gregory's comment and criticism.

The documents supplied prior to bidding and the execution of said contracts set forth timber measurements in great detail. Most timber measurements made by the United States were described as 100% cruises in the Timber Sale Notices which induced Gregory's participation in the auctions. A 100% cruise according to industry and BLM alike means that *every* tree has been counted and measured.

BLM spent thousands of hours measuring and estimating the timber on the 12 tracts for which Gregory bid. Contrary to the assertion of the United States, Opp. at 2[1],

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1/ References to United States Brief in Opposition will hereinafter be referenced as Opp. at __.

the detailed estimates were used not only for administrative purposes, but also for establishing the minimum bid prices. By affidavits of its officers, Gregory has stated that small businesses had to rely upon the representations of BLM because they could not afford to duplicate the timber cruising by BLM foresters.

The BLM required as part of the bidding process that the bidders warrant they had examined and inspected the timber. BLM allowed only 30 days for inspection between the announcement of the sales and the actual auctions. Gregory submitted affidavits showing that 30 days was barely sufficient for inspection due to weather. There were no standards set by BLM for this examination and inspection. It was never stated by BLM that inspection entailed a duplication by bidders of BLM's cruises. BLM disclaimed all warranties in its bid documents. The exculpatory clause was inconspicuous and in fine print.

The United States is the only source of timber available for many small bidders in Western Oregon. BLM relied on the disclaimer of all warranties with the result that BLM had no obligation to deliver anything at all. In this case, timber shortages as high as 50% were approved by the decision of the Federal Circuit. The words "approximately" and "more or less" appeared repeatedly throughout the contractual documents. The effect of the words "more or less" and "approximately" will be discussed infra. The repetition of these terms would convince a reasonable merchant in the trade that the detailed estimates of timber available for harvesting were subject only to minor variations in quantity.

The lower court stated that industry had notice of BLM's practice of advertising inflated estimates of timber available. However, key documents which would have shown

the *extent* of such shortages, for the Eugene District were *not* made available to the public and were seen by Gregory only after vigorous litigation to compel their production.

In its statement of the case, Opp. at 3, the United States characterizes Gregory as "alleging" a 26% shortfall in timber recovery when compared with the "estimates" made by the personnel of the BLM. The shortfalls were set forth on reports tendered by Gregory to BLM during the performance of the contracts. Gregory's shortfall in timber recovery has heretofore been uncontradicted, and its losses or hardship were never questioned.

Gregory was required to submit a "Scale Disposition of Timber Removed Report"[2] to the contracting officer after logging was completed in each contract. App. at 132. This report summarized the amount of timber recovered by species and commercial grade, as measured by the Columbia River Scaling Bureau, an impartial third- party agency. The Columbia River Scaling Bureau is relied upon by the timber industry to provide an accurate measure of timber volume for the purpose of calculating *fair* prices for timber *after* it is harvested. BLM accepted the validity of the measurements made by the Bureau. Gregory's officers were required to swear to the accuracy of the figures in the report under criminal penalties pursuant to 18 U.S.C. § 1001. BLM, furthermore, used the figures set forth in the report

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2/ See a sample of such a completed form at page 132 of the Joint Appendix to the Briefs of Plaintiff-Appellant Gregory Lumber Co. and Defendant-Appellee United States in the Court of Appeals for the Federal Circuit, Docket #87-1208. A copy of said Appendix was submitted to the Clerk of this Court as a lodgement on or about December 2, 1987. References to said Appendix will hereinafter be made as "App. at ____."

submitted by Gregory and sworn to by its officers to calculate a recovery ratio as set forth in BLM's "Cruise-Scale Comparison." App. at 131.

The United States in Point 2 states that an "exhaustive review" of the case was made by the lower court. Gregory submitted 55 exhibits with its supplemental opposition to the motions for summary judgment on May 19, 1986. The Claims Court discussed only two of these exhibits. There is no indication anywhere in the opinion that the affidavits sworn to by the officers of the corporation or their expert witnesses were read by the Claims Court. If the Claims Court had examined the evidence it would have known that industry never knew the extent of the shortages in timber recovery because the Cruise-Scale comparisons were never made available by BLM. Not until March 1986, after spirited litigation to compel production of documents did anyone outside of BLM gain access to the Cruise-Scale comparisons collected by BLM in Eugene, Oregon. Nevertheless, the lower court characterized these reports as "public documents" in reaching its conclusion about industry knowledge. Admittedly, they *should* have been public. BLM directed its employees to begin collection of shortage data in January 1972, but did not make the results available to the public. Eventually, industry refused to bid on 25% of the auctions because of shortfalls. App. at 140-141.

III. RESPONSE TO THE "ARGUMENT" OF THE UNITED STATES

Having asserted that the issue in this case should be framed as one of "assumption of risk," a tort concept, the United States has argued a portion of the case in chief on the merits.

1. In its first argument, the United States characterized the language of the contracts as "plain" and "unambiguous," citing *NRM Corp. v. Hercules Inc.*, 758 F.2d 676, 681 (D.C. Cir. 1985). But *NRM* stands for a more fundamental principle. That case resulted in a remand to the Trial Court for further proceedings, because "NRM should have an opportunity to present evidence bearing on the material question of the intended scope of the agreements." *Id.* at 684.

> In any event, as we have shown, courts construing similar language in federal government contracts typically have looked beyond the four corners of the agreement to determine that the parties intended to include delay and impact costs in their negotiations. *Id.* at 684.

A similar examination by the Federal Circuit here would have demonstrated that no prudent man would sign a contract in which the United States was at liberty to deliver nothing at all.[3]

The United States attempted to distinguish *United States v. Atlantic Dredging Co.*, 253 U.S. 1 (1920), which was only one of the 45 precedents cited in the Petition.

3/ The United States relies on *Cafall Bros. Forest Products, Inc. v. United States*, 678 F.2d 1071 (Ct. Cl.), cert. denied 459 U.S. 908 (1982) for the proposition that Forest Service estimates are not "guarantees." Gregory never asserted that estimates were "guarantees." The issues raised by Gregory i.e., "commercial reasonableness" and application of the U.C.C. were not pleaded nor decided in *Cafall*. Nor did the *Cafall* court consider the effect on the contract of terms such as "more or less" and "approximately."

The United States failed in *Atlantic Dredging* to reveal facts just as it did so in Gregory's case. This Court reversed for reasons that should govern here. The United States in *Atlantic Dredging* attempted to divest itself of all responsibility by telling the contractor to inspect the site.[4]

2. In its second argument, the United States admits that there are previous decisions of this Court which interpreted "more or less" and "approximately" in the same way Gregory does. The United States quotes several contractual documents where the term "more or less" occurs. Nevertheless, there is a complaint that evidence of the use of the words was not produced in the Petition for Certiorari. The Joint Appendix at p. 106-109, includes portions of some of the contractual documents in which the words "more or less" and "approximately" are set forth.

In a final and defensive rationalization, the United States says: "The words 'more or less' in this context do not mean 'approximately'." Opp. at 6. No authority was cited for this gratuitous definition. But the decisions of this Court are clear in this regard[5]. The lower court never discussed or ruled on the effect of the words "approximately" or "more or less" despite pleadings by Gregory raising the issue. The United States redefines the word "approximately" so as to mean that "the purchaser must pay the full price." Opp. at 5. The idea of commercial reasonableness and "good faith" would be expunged from the law by the Federal Circuit if the Gregory decision stands.

4/ The United States in *Atlantic Dredging* argued sixty-eight years ago, as it does here, that tort law applied rather than contract law. This Court disagreed, affirming an award.

5/ See Petition at 15 *citing Brawley v. United States*, 96 U.S. 168 (1877).

3. Gregory developed the history and application of the U.C.C. as a unified body of law in its Petition at 18-30. See U.C.C. § 1-104 (1977). The United States failed to respond clearly on this point in its third argument. The United States apparently believes it should be free to select what clauses of the U.C.C. apply to federal contracts, making it a gambler's choice when the United States acts as a "merchant." *Priebe and Sons, Inc. v. United States,* 332 U.S. 407 (1947) does not stand for the conclusion represented in the Opposition. Justice Douglas in *Priebe* at 332 U.S. 407, 413-414, wrote that penalties are improper in federal contracts although levied under the guise of "liquidated damages," and further that general contract law should obtain in Federal contracts.

> "The other view is such a radical break with the past and so counter to the whole development of the law as to indicate that the Congressional purpose should be plain before we take the step,. Reversed." *Id.* at 414.

The Gregory decision is also contrary to the development of the law merchant.

4. In its fourth argument, the United States challenges Gregory's reliance upon the U.C.C. concept of a merchant's obligation to act in "good faith" as set forth in U.C.C. § 2-103(1)(b) (1977) "Definitions and Index of Definitions." The United States advances reasoning which equates a breach of the obligation of "good faith," under the U.C.C. with "bad faith." under tort law. The Federal Circuit also adopted the position that proof of malice and intention to harm were required for recovery in this case. The cases relied upon by the lower Court were

from the law of libel and slander by public officials where deliberate intent to harm must exist for recovery. The lower Court never analyzed the circumstances to determine whether or not the United States had acted in "good faith" as a "merchant." The Federal Circuit, therefore, created a legal environment in which the concepts of the U.C.C. will be applied in an arbitrary and contrived manner to contracts for the sale and purchase of goods by the United States.

The record abounds with evidence of unfairness although no hearing and no trial were allowed. It would be unreasonable and inequitable to allow the United States to demand contractual payments based upon estimates, represented to be "approximate" and "more or less," while obligating the United States to deliver nothing in return.

IV. CONCLUSION

The Federal Circuit is in conflict with this Court and other federal courts as to three issues, any one of which justifies reversal of the Federal Circuit.

If permitted to stand, this Federal Circuit decision will preclude review of future federal contract disputes where the U.C.C. should be applied to the sale and purchase of goods by the United States acting in a proprietary capacity. In a case similar to Gregory's the Eighth Circuit Court of Appeals stated almost 80 years ago:

> Where the language of an agreement is contradictory, obscure, or ambiguous, or where its meaning is doubtful, so that the contract is fairly susceptible of two constructions, one of which makes it fair, customary, and such as

> prudent men would naturally execute, while the other makes it inequitable, unusual, or such as reasonable men would not be likely to enter into, the interpretation which makes it a rational and probable agreement must be preferred to that which makes it an unusual, unfair, or improbable contract *A. Leschen and Sons Rope Co. v. Mayflower G.M. and R. Co.*, 173 F. 855, 857 (8th Cir. 1909).

For the above stated reasons, Gregory respectfully requests this Court to issue a Writ of Certiorari to the Court of Appeals for the Federal Circuit on issues I, II, and III, set forth in its Petition submitted November 27, 1987.

Respectfully submitted,

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Dated: February 16, 1988